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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA on the relation of MURRAY BRENSILBER and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, in their own behalf, 1

Plaintiffs-Appellants,

—against—

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER,

Defendants-Respondents.

Statement Under Rule 13.

This action was commenced in the United States District Court for the Southern District of New York by filing a complaint on December 17, 1941. Copies of the summons and complaint were served on Bausch & Lomb Optical Co. and the individual defendants by the United States Marshal, Western District of New York, at Rochester, N. Y. 2

The names of the parties are as herein above given.

There has been no change of parties in this action since the commencement thereof.

The defendants were not arrested nor was any bail taken. No property was attached.

No trial has been had in this action.

No question was referred to a commissioner, master or referee. 3

Defendants moved before answering, in the District Court for summary judgment in defendants' favor, pursuant to rule 56 and for an order under rule 12 of the Federal rules of Civil procedure, on papers served on or about January 6, 1942 and January 14, 1942 respectively. All motions were heard simultaneously by Honorable Alfred C. Coxe, District Judge on the 16th day of January 1942.

Statement Under Rule.

Order for judgment granting defendants' summary judgment and directing that judgment be entered for the defendants, dismissing the complaint on the merits together with
4 the costs and disbursements of the action was entered in the office of the Clerk of the District Court on January 24, 1942 and judgment dismissing the complaint of the plaintiffs upon the merits with costs in favor of the defendants was filed and entered in the office of the Clerk of the District Court on February 2, 1942. A further order declaring plaintiffs' amended complaint a nullity was entered in the Office of the Clerk of the District Court on the 24th day of January 1942.

The appeal herein was taken on February 6, 1942 and a
5 supersedeas and cost bond was duly filed herein.

6

Original Complaint.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

7

UNITED STATES OF AMERICA on the relation of MURRAY BRENSILBER and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, in their own behalf,

Plaintiffs,

—against—

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER,

Defendants.

8

Plaintiffs complaining of the defendants respectfully allege as follows:

First: That the plaintiffs are and at all times herein mentioned were, and each of them is, a citizen of the United States of America and of the State of New York, and each of them is a resident of the State of New York.

Second: The plaintiffs bring this action in behalf of the United States of America and in their own behalf by virtue of and pursuant to United States Revised Statutes Sections 3490-3494 (31 U. S. C. 231-235) under which said statutes this action arises. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3000.00.

9

Third: Upon information and belief that the defendant, Bausch & Lomb Optical Company is a New York Corporation and has maintained and now maintains an office and place of business in the Borough of Manhattan, City of New York within this Southern District of New York, and has

transacted business and now transacts business within sa
District.

10 Fourth: That upon information and belief, Carl Zei
Inc. is a New York Corporation and has maintained a
now maintains its principal office in the Borough of Ma
hattan, City of New York within this Southern District
New York, and has transacted business and now transac
business within said District.

Fifth: Upon information and belief, M. H. Eisenha
Carl L. Bausch and Theodore B. Drescher, are and each
them is and was at the times herein mentioned, associat
with Bausch & Lomb Optical Company and Carl Zeiss In
and has held and at the present time hold the position of
11 officer and director of each of said corporations and we
and are actively engaged in the management, direction a
control of the affairs and policies of said corporations.

Sixth: Upon information and belief that the said Baus
& Lomb Optical Company and Carl Zeiss Inc. are and we
at the times herein mentioned engaged in the business
manufacturing and selling of various instruments, amo
others, periscopes, range finders, altimeters, bore-sigh
bombsights, torpedo directors, sights for guns and oth
scientific optical instruments (except binoculars) used
direct and control the firing of modern instruments of w
12 fare, hereinafter referred to as "military optical inst
ments".

Seventh: That upon information and belief the Uni
States Government purchased such military optical inst
ments for use on battleships, cruisers and submarines, a
for use with aircraft and artillery.

Eighth: The defendant, Bausch & Lomb Optical Company, from on or about April 28, 1921, and the defendant Carl Zeiss Inc. from the date of its incorporation on or about December 11, 1925, and the individual defendants since the time they became officers and directors of said corporation to on or about March 29, 1940, together with other persons to the plaintiffs unknown, have been continuously engaged during and throughout the periods of time aforesaid, in an unlawful combination and conspiracy, not to sell directly or indirectly military optical instruments for use in the United States of America and the Government of the United States of America by either of them without the consent of the other and in the case of sales made by consent to the United States Government, to fix, maintain and control arbitrary, artificial and unreasonable prices and terms of sale of such military optical instruments, and agreed between them that quotations of prices by either of them could be made only with the consent of the other, and that if either of them were requested to make or made bids for the sale of military optical instruments to the United States Government, that such quotations and such bids would contain a markup over the regular price up to 20% of said regular price, and in case such bid were successful, the excess was to be paid by the successful bidder to the other contracting party.

Ninth: That upon information and belief to the end and purpose aforesaid and to carry out and promote the unlawful combination and conspiracy by and between them, the said corporate defendants entered into certain written agreements on or about April 28, 1921, and supplemental and modifications thereof on or about June 27, 1925, on or about October 28, 1925, on or about November 26, 1926, and on or

about December 24, 1926, wherein and whereby the said corporate defendants bound themselves not to sell such military optical instruments directly or indirectly to the United
16 States Government unless the parties have come to an agreement regarding the conditions of sale, and a royalty or percentage of the gross sales price of each military optical instrument sold to the United States Government by either of them to be paid to the other, and agreed, among other things, that neither of them would make or give quotations or bids for sales of military optical instruments without the consent of the other, and that the price quoted should be agreed upon between them, and that on all such bids by either of them to the United States Government, such bids
17 and quotations would contain a markup over the regular price up to 20% over the regular price, which excess in case such bid were successful, was to be paid by the successful bidder to the other contracting party.

Tenth: That upon information and belief, between April 28, 1921 and March 29, 1940 the combination and conspiracy hereinbefore alleged has been operated and carried out in part within the Southern District of New York and said corporate defendants have by their concerted action aforesaid, sold, shipped and delivered military optical instruments to the Government of the United States at arbitrary, artificial and unreasonable and noncompetitive prices agreed
18 upon by the defendants, and said defendants received payments from the United States Government for the sale and delivery of such military optical instruments which they divided between them in accordance with their said agreements.

Eleventh: Upon information and belief that in pursuance of said conspiracy, combination and agreements by

the defendants, they severally at various times between May 1921 and March 1940, did submit to the Government of the United States bids for contracts for the manufacture and sale and the sale of military optical instruments and other articles and materials to be used by the United States Government in the War, Navy and other departments and bureaus of the Government at prices that pretended to be and were represented to be, and which the Government of the United States and the officer and officers authorized to accept such bids and enter into such contracts for manufacture and sale, and the sale and delivery of such military optical instruments, articles and materials for which bids were submitted and contracts therefor and sales and delivery thereof made, believed to be the normal, prevailing and competitive prices of such military optical instruments, articles and materials, but which in fact were not the normal, prevailing and competitive prices therefor but were about 20% in excess of the normal, prevailing and competitive prices for such military optical instruments, articles and materials, and the officer or officers authorized to accept such bids and enter into such contracts of sale and make such purchases on behalf of the Government of the United States, the Treasury, War and Navy Departments, respectively, without knowledge of the conspiracy, combination and agreement aforesaid entered into by the defendants, accepted various bids submitted by the defendants severally at various times, the exact dates of which are presently unknown to the plaintiffs, for manufacture and sale and the sale of military optical instruments and other articles and materials to the Government of the United States in the War and Navy Departments thereof, and said officer or officers on behalf of the Government of the United States, its Treasury, War and Navy Departments, did make vari-

ous purchases from time to time, the exact dates of which are unknown to the plaintiffs, of such instruments, articles and materials to be supplied to the War and Navy Depart-
22 ments in large quantities and amounts, the exact prices, amounts and particulars of which are presently unknown to the plaintiff.

Twelfth: Upon information and belief that at various times between May 1921 and March 1940, the defendants severally and from time to time, the exact dates being at present unknown to the plaintiffs, presented for payment and approval to various officers of the Civil, Military and Naval service of the United States, bids, claims, invoices, bills, vouchers and statements and accounts against the
23 United States for purchases of military optical instruments and other articles and materials upon the aforesaid bids, contracts and sales in large sums of money, the exact amount of which is at present unknown to the plaintiffs, the defendants knowing that such bids, claims, invoices, bills, vouchers, statements and accounts were excessive, false, fictitious and fraudulent by reason aforesaid, and in that said defendants added to the normal, prevailing and competitive prices, an amount equal to about 20% arbitrarily pursuant to the conspiracy, combination and agreement between the defendants aforesaid, and said claims, bills, statements and accounts were respectively paid and satisfied.

24 Thirteenth: That upon information and belief the individual defendants and each of them participated in and aided and abetted in the matters and things herein alleged.

Fourteenth: Upon information and belief, 20% of the amount of such bids, claims, invoices, bills, statements and accounts which contained the 20% added to the regular price that were presented by the defendants and which

they caused to be presented for payment and approval and obtained payment thereof from the Government of the United States, the Treasury, Navy and War Departments, respectively in the year 1938 amounted in the aggregate, and was equal to about the sum of $8,000,000. in which said sums the defendants are indebted to the United States Government, and various sums of money in other years, the exact amount of which is at present unknown to the plaintiffs, which said sums the defendants are indebted to the United States Government. 25

Fifteenth: Upon information and belief that prior to March 1940 and at the time of the commission of the acts and conduct complained of in paragraphs "Eleventh" and "Twelfth" hereof, the corporate defendants manufactured, distributed and sold the greater part of all the military optical instruments manufactured and sold in the United States of America and in foreign countries. 26

Sixteenth: That upon information and belief the agreements, acts and conduct of the defendants constituted a fraud upon the United States of America and were and are against the Public Policy, and were a violation of the Revised Statutes of the United States, §§3490-3494 (U. S. C. 231-235).

Seventeenth: That upon information and belief the aforesaid agreements by and between the defendants herein, and the aforesaid acts and conduct constituted also an unlawful combination and conspiracy in violation of the Statutes of the United States and more particularly the Act of Congress of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U. S. C. Title 15, Sec. 1) and the Amendments thereof. 27

Eighteenth: Upon information and belief the defendants are not and were not at the times herein mentioned, nor any of them, in the military or naval service of the United States or in the Militia called into or actually employed in the service of the United States.

Nineteenth: By reason of the premises, and the acts and conduct of the defendants and the Statutes of the United States in such case made and provided, the defendants are indebted to the Government of the United States in the sum of about $20,000,000. in which amount the Government of the United States sustained damages and the defendants shall forfeit and pay to the United States the sum of $2,000. for each of said transactions and in addition double the amount of damages sustained by the Government of the United States, and of which amount of damages and forfeitures the plaintiffs herein are entitled to receive one-half of such forfeitures and amount of damages which they shall recover and collect, and all costs the Court may award against the said defendants.

WHEREFORE plaintiffs demand judgment against the defendants for the sum of double the amount of said damages aforesaid, to wit, $40,000,000., and in addition thereto the amount of forfeitures and penalties as ascertained and determined by this Court, which shall be at least in the sum of $2,000. together with the interest on said sums and the costs of this action.

EMANUEL THEBNER,
Attorney for Plaintiffs,
Office & P. O. Address,
111 John Street,
Borough of Manhattan,
City of New York.

Order to Show Cause Dated January 6, 1942.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

31

UNITED STATES OF AMERICA on the relation of MURRAY BRENSILBER and EMANUEL THEBNER, in their own behalf,

Plaintiffs,

—against—

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER,

Defendants.

32

On the summons and complaint and upon the Marshal's returns herein, all filed in this Court, and upon the annexed affidavits of Whitney North Seymour, M. Herbert Eisenhart, Carl L. Bausch, Theodore B. Drescher, E. Herman Anthes and Russell E. Craytor, sworn to this 5th day of January, 1942, let the plaintiffs herein and each of them show cause before this Court, at a stated term for the hearing of motions to be held in Room 506 of the United States Court House, Foley Square, in the Borough of Manhattan, City, County and State of New York, on the 16th day of January, 1942, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be entered herein,

33

(a) Dismissing this action and the complaint herein as against the defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher, on the ground that the venue of this action as to the said defendants has been improperly laid in the Southern District of New York;

Order to Show Cause Dated January 6, 1942.

(b) Dismissing this action and the complaint herein as against the said defendants, on the ground that the complaint fails to state a claim against these defendants
34 upon which relief can be granted;

(c) Granting summary judgment to these defendants on the ground that the complaint and affidavits herein show that there is no genuine issue as to any material fact herein and that these defendants are entitled to judgment against the plaintiffs as a matter of law;

and for such other and further relief as to this Court may seem just and proper, together with the costs of this motion.

Sufficient cause appearing therefor, it is
35

ORDERED that the time of the defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher to answer the complaint herein be and the same hereby is extended to and including ten (10) days after entry of an order disposing of this motion; and it is

FURTHER ORDERED that service of a copy of this order and the affidavits annexed, at the office of Emanuel Thebner, attorney for plaintiffs, 111 John Street, Borough of Manhattan, City, County and State of New York, on or before
36 six o'clock P. M. on January 7th, 1942, be deemed sufficient service hereof.

Dated, New York, N. Y., January 6th, 1942.

ALFRED C. COXE,
United States District Judge.

AFFIDAVIT OF WHITNEY NORTH SEYMOUR ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 6, 1942.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

WHITNEY NORTH SEYMOUR, being duly sworn, deposes and says:

I am an attorney and counsellor at law and a member of the firm of Simpson Thacher & Bartlett, attorneys for the defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher in this action, on whose behalf the annexed motion is made.

This affidavit is submitted by me on behalf of the said defendants in support of an application for an order to show cause why an order should not be made dismissing the complaint herein on the grounds: (1) that the venue of this action has been improperly laid in the Southern District of New York, (2) for failure to state a claim against these defendants upon which relief can be granted, and (3) for summary judgment on the ground that the complaint and affidavits herein show that there is no genuine issue as to any material fact herein and that defendants are entitled to judgment against plaintiffs as a matter of law. The grounds for this motion are more fully set forth in the annexed affidavits of M. Herbert Eisenhart, Carl L. Bausch,

Affidavit of Whitney North Seymour Read in Support of Order to Show Cause Dated January 6, 1942.

Theodore B. Drescher, E. Herman Anthes and Russell E. Craytor. The reasons why it is desirable and necessary that
40 this motion be brought on by order to show cause rather than the usual notice of motion, are as follows:

Rule 12 of the Federal Rules of Civil Procedure provides in effect that the service of any motion provided for in Rule 12 automatically extends the time for answering the complaint until ten days after disposition of the motion. The same Rule provides for motions to dismiss the complaint because of improper venue and for failure to state a claim upon which relief can be granted. It is not clear that affi-
41 davits may be considered on a motion to dismiss on the latter ground in this District. These moving defendants believed that the Court should be provided upon this motion with certain additional facts demonstrating the absence of merit in this action, and it was, therefore, deemed advisable to move as well for summary judgment under Rule 56b. Although it is clear under that Rule that the motion for summary judgment can be made before answering, the Rule does not provide for an extension of time to answer upon the making of the motion, nor is it entirely clear that by joining the motion for summary judgment with the motion to dismiss the complaint these defendants secure for all pur-
42 poses the benefit of the automatic extension provisions of Rule 12, since Rule 12g refers only to consolidation of motions made under that Rule. Therefore, this application for an order to show cause is made out of an abundance of caution as an application under Rule 6 to extend the time of these defendants for answering the complaint herein, and, for the reasons set forth below, to permit service of these motion papers in less than the ten days required by Rule 56c, if necessary.

Affidavit of Whitney North Seymour Read in Support of Order to Show Cause Dated January 6, 1942.

These defendants were served in Rochester, N. Y., with the summons and complaint herein by a Deputy United States Marshal for the Western District of New York, on December 26, 1941. Their time for answering would expire on January 15, 1942 unless otherwise extended. With the holiday period and the time spent in preparing these papers, it has been impossible to make this motion returnable until January 16, 1942, since Rule 56 requires ten days' notice of the motion for summary judgment. Under Rule 56c the plaintiffs herein should be served with the order to show cause and affidavits herein on January 6, 1942, if possible. It would have been difficult, if not impossible, for these defendants to have moved more promptly. It is respectfully requested that, in the event that this order to show cause is not signed in time for service thereof and of the papers upon which it was granted on the aforesaid January 6, 1942, this Court specify such subsequent date for the service of the same as it considers adequate and proper, and to that extent shorten the time necessary for the motion under Rule 56.

43

44

This motion is made in good faith and not for purposes of delay. I verily believe from my investigation of the facts and circumstances of this action that there are good and sufficient defenses thereto, and have so informed these defendants. On behalf of my firm, I represented these defendants in the anti-trust litigation with the Government, referred to in the annexed affidavit of M. Herbert Eisenhart, and I am familiar with many of the facts set forth in said affidavit. My information leads me to believe that the Court will find this action not maintainable as a matter of law and without merit as a matter of fact.

45

No previous application for similar relief has been made.

Affidavit of Whitney North Seymour Read in Support of Order to Show Cause Dated January 6, 1942.

WHEREFORE, it is respectfully requested that an order to show cause, in the form annexed hereto, be signed bringing
46 this motion on for hearing on January 16, 1942, extending the time of these moving defendants to answer the complaint herein until ten days after the entry of an order upon said motion, and, in the event that service of the said order to show cause and the papers upon which it was granted cannot be made on January 6, 1942, as required by Rule 56c of the Federal Rules of Civil Procedure, providing that the same be served at such subsequent time and place as to the Court may seem just and proper; and that the motion herein be granted.

47 (Sworn to by Whitney North Seymour, January 5th, 1942.)

48

AFFIDAVIT OF M. HERBERT EISENHART ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 6, 1942.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF MONROE, *ss.*:

M. HERBERT EISENHART, being duly sworn, deposes and says:

I am the President and General Manager and a director of the defendant Bausch & Lomb Optical Company (hereinafter sometimes called "Bausch & Lomb" for brevity) and also an individual defendant in this action. This affidavit is submitted in support of a motion made on behalf of said defendant Bausch & Lomb and the individual defendants to dismiss the complaint herein and for summary judgment in favor of said defendants upon the various grounds set forth in the order to show cause by which this motion is made returnable. The motion is brought on by order to show cause because I am advised by counsel and believe that it is desirable that an extension of time to answer the complaint be obtained during the consideration of this motion by the Court and until ten days after the decision hereon. The reasons for proceeding by order to show cause are more fully stated in the affidavit of Whitney North Seymour, Esq., of counsel for these defendants, which is annexed hereto.

Affidavit of M. Herbert Eisenhart Read in Support of Order to Show Cause Dated January 6, 1942.

The grounds of this motion may be summarized as follows:

52

I. The venue of this action has been improperly laid in the Southern District of New York and this action may not properly be maintained against these moving defendants in this District.

II. The complaint fails to state a claim against these defendants upon which relief can be granted.

III. No cause of action in fact exists against these defendants under United States Revised Statutes, Sections 3490-3494 (31 U. S. C. A. §§231-235) under which this action purports to be brought.

53

For convenience this affidavit will proceed with reference to these grounds of the motion.

I.

Bausch & Lomb Optical Company and the individual defendants M. Herbert Eisenhart, Carl L. Bausch and Theodore B. Drescher are not and have not been found within the jurisdictional limits of this Court nor is any of them a resident or inhabitant of the Southern District of New York. Bausch & Lomb Optical Company owns and operates a large
54 manufacturing plant at Rochester, New York, in which military optical instruments, ophthalmic goods, scientific instruments and other products are manufactured. The executive office of the Company is at Rochester, New York. While the Company maintains a small office in the City of New York for limited purposes, it is believed that the facts hereinafter set forth and those set forth in the annexed affidavits of E. Herman Anthes and Russell E. Craytor show that

Affidavit of M. Herbert Eisenhart Read in Support of Order to Show Cause Dated January 6, 1942.

the maintenance of this office is not sufficient to lay the venue of this action in this District.

55 I am a resident and inhabitant of the City of Rochester, New York, residing at No. 1316 East Avenue, in that City. The defendant Carl L. Bausch is a resident and inhabitant of the City of Rochester, New York, residing on Parsons Lane, in that City. The defendant Theodore B. Drescher is a resident and inhabitant of the City of Rochester, New York, residing at No. 99 Pelham Road, in that City. The City of Rochester is within the jurisdictional limits of the United States District Court for the Western District of New York and is not within the jurisdictional limits of the United States District Court for the Southern District of 56 New York. Service of process in this action was made on these moving defendants in Rochester, New York, on December 26, 1941, by a Deputy Marshal of the United States District Court for the Western District of New York. Reference is made to the Marshal's return upon said service of process in the files of this Court with the same force and effect as if set forth in full herein.

The small office maintained by Bausch & Lomb at 30 Rockefeller Plaza, in the Borough of Manhattan, City of New York, is primarily used for the purpose of displaying scientific and ophthalmic instruments manufactured by it at Rochester, New York. All substantial orders for such 57 products are transmitted to the executive office of the Company at Rochester for approval and acceptance. No officer or director of Bausch & Lomb is connected with that office nor are any of the ordinary corporate activities of the Company carried on there. These individual moving defendants perform no official functions in that office. The employees

of the Company who make that office their headquarters are under the supervision of the heads of their respective
58 departments at Rochester, with the exception of the small clerical staff which is under the control of Mr. Anthes. This office has no connection whatever with the portion of the Bausch & Lomb business involved in this action—the manufacture and sale of military optical instruments. In sum, the office is used chiefly to perform promotional functions for certain departments of the Bausch & Lomb business; final and important decisions are all made at Rochester. It is submitted that this fragment of the Company's operation does not permit the conclusion that the Company is
59 found in this District.

So far as is known, no attempt was made by the Marshal of this Court to effect service on the defendant Bausch & Lomb Optical Company by serving Mr. Anthes or anyone else employed in the said office of Bausch & Lomb in the City of New York.

This objection to the maintenance of this suit against these defendants in this Court is not a mere technical objection designed to delay or impede justice. For reasons stated later, this action is wholly without merit, and justice requires its final dismissal. But, in any event, it is essential that this action should not proceed in this Court if the venue is
60 improperly laid here because personal participation in these proceedings in New York and further absence from their official duties in Rochester would seriously impede the services which these defendants are rendering to national defense. Prior to the outbreak of the European war in 1939, Bausch & Lomb was actively engaged in the manufacture of military optical instruments for the United States Army and Navy. Thereafter the demands by the United States

Affidavit of M. Herbert Eisenhart Read in Support of Order to Show Cause Dated January 6, 1942.

Government on Bausch & Lomb for military optical equipment became steadily more heavy. Those demands are still 61
increasing. Bausch & Lomb, its executives and employees have done and are doing everything in their power to meet the needs of the armed forces. As President of the Company my time and energies are spent largely in discharging the executive responsibilities in connection with the production of these products for national defense. The defendants Carl L. Bausch and Theodore B. Drescher, who are also officers of the Company, are directly charged with responsibility for various phases of production of instruments for national defense. Their whole time is required at Rochester for this purpose. Employees of Bausch & Lomb Optical Company 62
familiar with the past history of transactions in military optical instruments are all located in Rochester, and are spending their full time there on the production of military optical instruments for the United States Government. Any interference with this work must be avoided. Proper regard for the requirements of military secrecy seem to me to prevent detailed presentation of the precise nature and importance of the work now being done by these defendants. However, I earnestly submit that time spent by them during the current emergency in preparing this case for trial, answering interrogatories or in appearing as witnesses would interfere seriously with matters of great importance to the 63
defense program. While any proceedings requiring attention of those concerned with production for defense would interfere with matters of importance to defense, proceedings requiring attendance at a distance from their place of business would be particularly disruptive. Accordingly even if there were not other grounds for dismissal, the action should

be dismissed for improper venue against all these moving defendants.

64 The joinder of Carl Zeiss, Inc., a New York corporation with its principal place of business within this District, cannot aid plaintiffs in attempting to lay the venue in this District. As will appear later, the agreements upon which plaintiffs purport to rely, copies of which are part of the records of this Court, show on their face that they were made not with Carl Zeiss, Inc. but with Carl Zeiss of Jena, Germany, not named as a defendant in this action and not within the jurisdiction.

II.

65

I have been advised by counsel and believe that on its face this complaint states no cause of action against these defendants and dismissal is sought on this ground. No useful purpose would be served by presenting any part of the legal argument here. I am advised by counsel and believe that the Statute under which this action purports to be brought was not aimed at nor does it cover even transactions of the character falsely and erroneously alleged in the complaint.

III.

66 The Court should dismiss this complaint and grant summary judgment in favor of these moving defendants under Rules 12 and 56 of the Federal Rules of Civil Procedure because no cause of action under the Statute invoked by plaintiffs exists in fact against these moving defendants. The complaint is made up largely of false and erroneous conclusions of law and of fact, many of them in direct con-

tradiction of facts which this Court may notice in the files of the Court. There is no genuine issue as to any material fact herein and the moving defendants are entitled to judgment as a matter of law. 67

A.

On March 26, 1940, the Anti-Trust Division of the Department of Justice procured the return of an indictment (C-107—169) in this Court against these moving defendants for alleged violations of the Sherman Anti-Trust Act and the Wilson Tariff Act, and covering the same subject matter as is now covered by the complaint in this action. Reference is made to the original indictment in the files of this Court for its scope and nature with the same force and effect as if fully set forth herein, but these defendants do not concede the correctness of all of the charges made in that indictment. The defendants originally pleaded not guilty to this indictment. On May 27, 1940, these defendants applied through counsel to Judge Goddard in open Court for leave to change their pleas of not guilty to pleas of *nolo contendere.* The Court was urged to permit this change of plea and to accept pleas of *nolo contendere* by counsel for these defendants and also by Hon. Samuel S. Isseks, Special Assistant to the Attorney General, representing the Anti-Trust Division of the Department of Justice. As the stenographic transcript of the proceedings shows, counsel for these defendants stated to the Court on that occasion that the primary reason for this change of plea was to permit these defendants to proceed with their defense work for the Army and Navy without the interruption which would have been entailed in preparing for and participating in the trial of 68 69

the criminal proceeding. In the course of the proceedings
70 before Judge Goddard, Judge Goddard asked Mr. Isseks whether any charge of fraud on the part of these defendants was involved, and Mr. Isseks replied: "No, sir, there is no charge of fraud against the defendants in connection with the acts complained of in the indictment." Judge Goddard accepted the pleas and, with the consent of these defendants, imposed fines totalling $40,000 upon them. This indictment was returned and disposed of after a thorough investigation by representatives of the Department of Justice, and the statement by Government counsel before Judge Goddard seems quite inconsistent with the charges of fraud made in
71 this complaint.

Following the entry of *nolo* pleas and by agreement between counsel for these defendants and the Anti-Trust division, a consent decree was entered on July 9, 1940, in an equity suit (Civil Action No. 9-404) instituted in this Court on July 8, 1940, and covering the same matters charged in the indictment. Reference is made to the complaint in that action and to the consent decree entered therein with the same force and effect as if fully set forth herein, but the defendants do not concede the correctness of all of the allegations in the Government's complaint.

The present action was instituted by service of process by
72 a Deputy Marshal of the Western District on these defendants at Rochester, New York, on December 26, 1941. This was approximately a year and a half after the entry of the consent decree just mentioned and after much publicity had been given to the proceedings of the Anti-Trust Division against Bausch & Lomb. The parallel between the dates mentioned in the present complaint and in the complaint in the Government's equity case indicates that this action was

not instituted without an examination of the files of this Court and a study of the papers on file in the Government's proceedings. Yet, for reasons of their own, plaintiffs have seen fit to distort the earlier charges made by Government counsel and in important respects to make allegations which are directly contrary to statements made by those who were proceeding without hope of individual pecuniary benefit. Among these significant contradictions are the following, which furnish positive demonstration of the irresponsibility of plaintiffs' fantastic charges: 73

1. Paragraph "Fifth" of the present complaint alleges that the individual defendants Eisenhart, Bausch and Drescher are officers and directors of Carl Zeiss, Inc., as well as of Bausch & Lomb. Both in the indictment and in the complaint in the equity action it is alleged specifically that these individual defendants have official connection only with Bausch & Lomb. No claim was made by the Government that they were officers or directors of Carl Zeiss, Inc. The fact is that none of these individual defendants has or has ever had any connection with Carl Zeiss, Inc. 74

2. Paragraphs "Eighth" and "Ninth" of the present complaint allege that the defendant Bausch & Lomb, on or about April 28, 1921, and the defendant Carl Zeiss, Inc., from on or about December 11, 1925 (together with the individual defendants alleged to be, but not in fact, officers or directors of Carl Zeiss, Inc.), entered into a conspiracy to defraud the United States Government, in effect, by having whichever corporate defendant made bids for the sale of military optical instruments to the United States Government add 20% to the amount of such bids and, if successful, 75

pay such 20% to the other corporate defendant. Paragraph
76 "Ninth" makes it clear that plaintiffs rely upon written agreements dated on or about April 28, 1921, June 27, 1925, October 28, 1925, November 26, 1926, and December 24, 1926. Copies of agreements bearing the same dates were annexed to the complaint in the Government's equity suit in which the consent decree was entered, the dates of November 26, 1926 and December 24, 1926, applying to the same agreement. It is apparent, therefore, that this action is based on the same agreements which were alleged in the Government's equity suit. I respectfully ask that the copies of agreements annexed to the Government's complaint be deemed incorpo-
77 rated by reference herein, with the same force and effect as if fully set forth herein. I know of no other agreements bearing upon the subject matter. An examination of said agreements in the files of this Court shows that the allegations in the instant complaint with respect to them are false in the following material particulars:

(a) None of these agreements was made between Bausch & Lomb Optical Company and the defendant Carl Zeiss, Inc. All were made with Carl Zeiss, of Jena, Germany. Indeed, the agreement of April 28, 1921, was made more than four years before the incorporation of the defendant
78 Carl Zeiss, Inc. Carl Zeiss, Inc. had nothing to do with any of these agreements, nor has Bausch & Lomb had any dealings with Carl Zeiss, Inc. in connection with the subject matter of these agreements.

(b) Paragraphs "Eighth" and "Ninth" of the complaint allege in effect that the agreements referred to required Bausch & Lomb to add 20% to all bids which it made to the

United States Government on military optical instruments. No such provision or requirement is included in the agreements. Yet the damages claimed in this case in astronomical amounts are predicated upon the existence of such a requirement in the agreements and the exaction by Bausch & Lomb, pursuant to such a requirement, of 20% on all bids made by it to the United States Government, with the use by defendants of false and fraudulent documents to obtain payment from the United States. The 1925 amendment to the 1921 agreement was in terms revoked by the 1926 agreement, and, in any event, it had no possible relation to bids by Bausch & Lomb to the United States Government. 79

Accordingly, it appears from the papers on file in this Court in connection with the proceedings by the Government (the theoretical partial beneficiary of plaintiffs' action) that the charges in this complaint are untrue in material particulars. The fundamental basis of this action, the Zeiss agreements, wholly fail to support the charges made. 80

B.

Not only are material allegations of the complaint shown to be false by reference to the records of this Court and the statements heretofore made, but the charges are utterly false in fact. There was not only no requirement in the agreement between Bausch & Lomb and Carl Zeiss, of Jena, that Bausch & Lomb should inflate its bids on military optical instruments to be supplied to the United States Government by 20%, or any other amount, to be paid to Carl Zeiss, of Jena, but there was no such inflation of bids. The price to be charged to the United States Government by Bausch & Lomb on military optical instruments manu- 81

factured by it for the Government was decided upon by
82 Bausch & Lomb alone without the participation or consent of any other organization. Bids made by Bausch & Lomb to the United States Government for such military optical instruments did not include 20% or any other artificial sum to be paid by Bausch & Lomb to Carl Zeiss, Inc., as charged in the complaint. The only payments made by Bausch & Lomb were the royalty payments provided for in the agreements, and are not material here. These did not exceed 7%, and, in any event, were paid to Carl Zeiss, of Jena, and not to Carl Zeiss, Inc. No possible claim of fraud is or could be made in connection with such payments.

83 In order to assist in the development of new and improved military optical instruments for the United States Government, sample instruments of foreign manufacture have occasionally been imported for examination and testing. Since Bausch & Lomb had manufacturing rights under designs and patents of Carl Zeiss, of Jena, for such equipment in the United States, the Army and Navy generally contracted with Bausch & Lomb for sample Zeiss military optical instruments. In such cases, the prices quoted by Carl Zeiss, of Jena, to Bausch & Lomb were determined independently by Carl Zeiss, of Jena, and the contract prices between the Army and Navy and Bausch & Lomb were determined in-
84 dependently by the latter, Bausch & Lomb assuming responsibility for the satisfactory character and performance of the instruments. Bausch & Lomb paid Carl Zeiss, of Jena, nothing beyond the net amount of its quotations for these instruments. On one occasion, in 1927, a contract was made between the United States Government and N. V. Nederlandsche Instrumenten Compagnie, of Venlo, Holland, a

subsidiary of Carl Zeiss, of Jena, for the importation of a sample military optical instrument. The contract price included 5% which was paid to Bausch & Lomb, as exclusive American licensee under the patents of Carl Zeiss, of Jena, covering this instrument. It was understood that Bausch & Lomb would assist the United States authorities in straightening out whatever questions might arise regarding the design and performance of the instrument and would undertake the manufacture of such further instruments of similar character as might be desired by the United States Government. 85

At no time was there any occasion when the 20% bid provision of the 1925 agreement—which, by its terms, was inapplicable to bids by Bausch & Lomb to the United States—was invoked in any transaction with the Government of the United States, to which Bausch & Lomb was in any way a party. The allegations in Paragraph "Eleventh" of the complaint are utterly false and untrue. 86

The complaint alleges in the language of the Statute (Paragraph "Twelfth") that at various undisclosed times the defendants presented for payment and approval to various officers of the Civil, Military and Naval Service of the United States, bids, claims, invoices, bills, vouchers, statements and accounts against the United States knowing that such documents were excessive, false, fictitious and fraudulent. I categorically deny those allegations. At no time did Bausch & Lomb, or anyone on its behalf, submit to any person or officer in the Civil, Military or Naval Service of the United States any claim upon or against the Government of the United States, or any department or office thereof, which was false, fictitious or fraudulent in any respect. I want to make it clear that the sweeping character 87

of this denial does not depend on the form of words of the
88 charge or of this answer. Bausch & Lomb is proud of its record of assistance to the military authorities of the United States and of the trust which has been reposed in it by them. Reflections on its integrity in such dealings are utterly without foundation. The fact that for a period it had certain agreements with Carl Zeiss, of Jena, which resulted in great benefits in the improvement of military optical instruments supplied to the United States Government and which were subsequently attacked as violating the anti-trust laws, furnishes no support for the charges so recklessly made in this suit.

89 These moving defendants settled the charges of violation of the anti-trust laws in good faith so that they could proceed with work necessary to national defense without interruption. In the course of those proceedings, a Special Assistant to the Attorney General stated in open court, after full investigation, that no charge of fraud was involved. These defendants believed at the time of the settlement, and now believe, that upon a trial of the charges of violation of the anti-trust laws they had defenses available to them but they considered that it was their duty to proceed with their work for national defense rather than to seek personal vindication. These and other defenses peculiar to this action,
90 such as the statute of limitations, and others, are still available to them and are reserved; but, regardless of the merits of the anti-trust proceeding, a matter which ought not now to be revived, it should require no formal trial of the issues to convince this Court that this action is utterly without merit or foundation in fact. In view of the facts and circumstances set forth in this and in the accompanying affidavits, these defendants are advised and believe that this action is

Affidavit of M. Herbert Eisenhart Read in Support of Order to Show Cause Dated January 6, 1942.

not maintainable, and they respectfully submit that they should not be required to interrupt their work for national defense to defend an action of this character. 91

I respectfully ask that the annexed order to show cause be signed so that the time of these moving defendants to answer will be extended during the consideration of this motion and so that, if necessary, the time for the motion under Rule 56 may be shortened and that, upon the return of this motion, the motion be granted in all respects.

(Sworn to by M. Herbert Eisenhart, January 5th, 1942.)

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AFFIDAVIT OF CARL L. BAUSCH ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 6, 1942.

UNITED STATES DISTRICT COURT

94 SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF MONROE, *ss.*:

CARL L. BAUSCH, being duly sworn, deposes and says:

95 1. I am one of the individual defendants named herein and am Vice-President in Charge of Engineering and Research and a director of the Defendant Bausch & Lomb Optical Company.

2. I am a resident and inhabitant of the City of Rochester, New York, residing on Parsons Lane, in that City.

3. Service of process in this action was made upon me in Rochester, New York, on December 26, 1941, by a Deputy United States Marshal of the United States District Court for the Western District of New York.

96 4. I have read the foregoing affidavit of M. Herbert Eisenhart, sworn to January 5, 1942, in support of this motion. The statements therein are true and I adopt them as my own and ask the Court to consider said affidavit as my own in support of this motion, without repeating again all of the matters therein set forth.

(Sworn to by Carl L. Bausch, January 5th, 1942.)

AFFIDAVIT OF THEODORE B. DRESCHER ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 6, 1942.

UNITED STATES DISTRICT COURT

97

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF MONROE, *ss.*:

THEODORE B. DRESCHER, being duly sworn, deposes and says:

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1. I am one of the individual defendants named herein and am Vice-President in Charge of Manufacture and a director of the defendant Bausch & Lomb Optical Company.

2. I am a resident and inhabitant of the City of Rochester, New York, residing at 99 Pelham Road, in that City.

3. Service of process in this action was made upon me in Rochester, New York, on December 26, 1941, by a Deputy United States Marshal of the United States District Court for the Western District of New York.

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4. I have read the foregoing affidavit of M. Herbert Eisenhart, sworn to January 5, 1942, in support of this motion. The statements therein are true and I adopt them as my own and ask the Court to consider said affidavit as my own in support of this motion, without repeating again all of the matters therein set forth.

(Sworn to by Theodore B. Drescher, January 5th, 1942.)

AFFIDAVIT OF E. HERMAN ANTHES ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 6, 1942.

UNITED STATES DISTRICT COURT

100 SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

E. HERMAN ANTHES, being duly sworn, deposes and says:

101 I am employed by Bausch & Lomb Optical Company, one of the defendants in this action. I reside at 2 Poplar Road, Larchmont, New York. Bausch & Lomb Optical Company (hereinafter sometimes called "Bausch & Lomb" for brevity) is a large manufacturer of optical, ophthalmic and other products. Its manufacturing plant is located in Rochester, New York, in the Western District of New York, and its executive offices are located there. For several years I have been in charge of a small office conducted by Bausch & Lomb under its name at 30 Rockefeller Plaza, New York, N. Y. This assignment was due to the fact that I had been for some years directly connected with the Scientific Instruments Department of Bausch & Lomb at Rochester, New
102 York. The lease for this office was executed by Bausch & Lomb at its executive offices in Rochester, New York. The rent for the office is paid by Bausch & Lomb at Rochester, New York.

Among the products manufactured by Bausch & Lomb are scientific instruments (including balopticons, microprojectors, microscopes, binoculars, magnifying glasses, etc.)

and ophthalmic products and instruments (including perimeters, binocular ophthalmoscopes, light sense testers and other equipment for the examination of the eye). The office at 30 Rockefeller Plaza provides an operations base for the promotional and soliciting activities engaged in by the staff, but it is essentially a display room for the various products manufactured by Bausch & Lomb, some of which are enumerated above. Price lists and other literature of Bausch & Lomb make it clear that orders are not valid until accepted at the offices of the Company at Rochester, New York. When educational or scientific institutions, or dealers, or other prospective purchasers of scientific instruments desire to order such instruments from Bausch & Lomb the orders therefor are transmitted by me to Bausch & Lomb at Rochester, New York, for acceptance. In each year in the months of August and September, perhaps twelve or fifteen microscopes are, as a special favor, sold to resident medical students, and from time to time binoculars, magnifying glasses and other incidental scientific instruments may be sold to individuals out of the small inventory which is maintained at the office solely as a matter of accommodation for such individual customers.

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The office staff, including myself, consists of sixteen employees of whom five constitute a clerical force under my immediate supervision. The clerical workers are paid out of a local bank account, which is also used for other petty cash disbursements. The average balance in this account is $2,000 or $3,000. The other employees whose base of operations is this office are paid by Bausch & Lomb from Rochester, and as to these employees I have no authority to hire or discharge. Excluding two employees whose function it is to demonstrate the display equipment maintained in the

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showrooms, five of the staff are concerned with the scientific
106 instruments field. Their duties consist of promoting the use of Bausch & Lomb instruments, servicing instruments in use and general promotion activities with respect to scientific instruments. All substantial orders received in the course of their activities are forwarded to Bausch & Lomb for acceptance.

Two other employees who make their headquarters in this office are concerned with ophthalmic products and instruments and the annexed affidavit of Mr. Craytor sets forth their activities. It appears therefrom that except for occasional sales from the small inventory maintained in the
107 office as an accommodation, their branch of the office likewise exists largely for promotional and informational purposes.

Neither I nor any of the other employees of Bausch & Lomb at this office is an officer or director of Bausch & Lomb Optical Company. No directors' or stockholders' meetings of Bausch & Lomb are held at this office and all other normal corporate activities of Bausch & Lomb are carried on at its office in Rochester, New York. Neither I nor any of the other employees have any general administrative or discretionary supervision over the general business of Bausch & Lomb, nor is any general business of that Com-
108 pany transacted from such office. Several years ago, to facilitate sales to the Department of Public Education in the City of New York, I was given a power of attorney authorizing me to sign bids and contracts and to accept payments therefor. However, the regular procedure is for such contracts to be finally passed on at the office of the Company at Rochester, New York.

(Sworn to by E. Herman Anthes, January 5th, 1942.)

AFFIDAVIT OF RUSSELL E. CRAYTOR ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 6, 1942.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

109

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

RUSSELL E. CRAYTOR, being duly sworn, deposes and says:

I am employed by Bausch & Lomb Optical Company of Rochester, New York. I reside at 167-10 Crocheron Avenue, 110
Flushing, New York.

I make my headquarters at the office at 30 Rockefeller Plaza, New York, N. Y., described in the annexed affidavit of Herman Anthes, but I am not under his supervision. I am directly responsible to Ben A. Ramaker, Sales Manager of Bausch & Lomb Optical Company, whose office is at Rochester, New York. My duties consist of visiting wholesale and retail users or prospective users of Bausch & Lomb ophthalmic products to promote the further use of such products. I travel extensively in the State of New York and in other nearby states in connection with these activities. One of the Bausch & Lomb employees who also makes his 111
headquarters at the office at 30 Rockefeller Plaza is engaged in activities similar to mine. From time to time, retailers give me orders for ophthalmic products, but no such orders are executed by me or at said office. In the case of all retail orders, the retail source of the order indicates to me what wholesaler to have the order placed through and the

order is then placed through such wholesaler. On occasion,
112 when the retail order is of such a character that it is not carried in wholesale stock and must be procured from the Bausch & Lomb factory, this same procedure of placing the order through the wholesaler is followed. I seldom have occasion to take direct orders from wholesalers, but on those occasions when I do take such orders, they are transmitted to Bausch & Lomb at Rochester for acceptance and execution. A small amount of representative ophthalmic equipment and instruments is maintained at the office at 30 Rockefeller Plaza. This is kept there for purposes of display and it is only on relatively infrequent occasions that parts
113 for and individual ophthalmic instruments may be sold directly from this small supply to individual customers, although such sales are made from time to time.

(Sworn to by Russell E. Craytor, January 5th, 1942.)

114

Notice of Motion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK 115

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE that on the summons and complaint and upon the Marshal's returns herein, all filed in this Court, and upon the annexed affidavit of Karl A. Bauer, sworn to the 6th day of January, 1942, a motion will be made at a Stated Term for the hearing of Motions to be held 116
at Room 506 of the United States Court House, Foley Square, in the Borough of Manhattan, City, County and State of New York, on the 16th day of January, 1942, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order (a) under Rule 12 of the Rules of Civil Procedure dismissing this action and the complaint herein as against the defendant, Carl Zeiss, Inc., on the ground that the complaint fails to state a cause of action against this defendant upon which relief can be granted, and (b) granting summary judgment under Rule 56 of the Rules of Civil Procedure on the ground
that the complaint and affidavits herein show that there is 117
no genuine issue as to any material fact therein, and that the defendant is entitled to judgment as a matter of law, and for such other and further relief as may be just and proper, together with the costs of this motion.

Notice of Motion.

Dated, New York, N. Y., January 6, 1942.

Yours, etc.,

118

JOSHUA D. JONES,
of GIFFORD, WOODY, CARTER & HAYS,
Attorneys for Defendant, Carl Zeiss, Inc.,
Office & P. O. Address,
One Wall Street,
Borough of Manhattan,
New York, N. Y.

To:

119 EMANUEL THEBNER, Esq.,
Attorney for Plaintiffs,
111 John Street,
New York, N. Y.

120

Affidavit of Karl A. Bauer Read in Support of Motion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK 121

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

KARL A. BAUER, being duly sworn, deposes and says: I am president of the defendant, Carl Zeiss, Inc., and submit this affidavit in support of a motion made on behalf of said 122 defendant, Carl Zeiss, Inc., to dismiss the complaint herein and for a summary judgment in favor of the said defendant upon the grounds set forth in the notice of motion herein.

I have been advised by counsel and believe that on its face the complaint states no cause of action against the defendant, Carl Zeiss, Inc., as the statute under which this action purports to be brought does not cover or apply to transactions of the character falsely and erroneously alleged in the complaint.

The complaint should be dismissed and summary judgment granted in favor of the defendant, Carl Zeiss, Inc., under Rules 12 and 56 of the Rules of Civil Procedure be- 123 cause the complaint is made up largely of false and erroneous conclusions of law and fact, practically all of which are directly contrary to facts which this Court may take cognizance of as they are in the files of this court.

On March 26, 1940, the Anti-Trust Division of the Department of Justice procured the return of an indictment

(File C-107-109) in this court against the defendants in this action, including the defendant, Carl Zeiss, Inc., for al-
124 leged violations of the Sherman Anti-Trust Act and covering the same subject matter as is now covered by the complaint in this action. Reference is made to the original indictment in the files in this court for its scope and nature with the same force and effect as if fully set forth herein, although deponent does not concede the correctness of the charges therein against the defendant, Carl Zeiss, Inc.

The defendant, Carl Zeiss, Inc., originally pleaded not guilty to the indictment. On March 5, 1941, this defendant applied, through counsel, to Judge Libell in open court for leave to change its plea of not guilty to a plea of *nolo*
125 *contendere*. This application was consented to by the Honorable Samuel S. Isseks, Special Assistant to the Attorney General, representing the Anti-Trust Division of the Department of Justice. Judge Libell accepted the plea and fined the defendant, Carl Zeiss, Inc., the sum of $1,000.

Paragraph "Fifth" of the complaint alleges that the defendants, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher, are officers and directors of Carl Zeiss, Inc. This is not the fact. Neither of these three men were ever at any time officers, directors or employees of Carl Zeiss, Inc. and were never at any time connected with the defendant, Carl Zeiss, Inc. in any capacity whatever.

126 Paragraph "Sixth" of the complaint alleges that Carl Zeiss, Inc. is engaged in selling periscopes, range finders, altimeters, boresights, bombsights, torpedo directors, sights for guns and other scientific optical instruments (except binoculars) used to direct and control the firing of modern instruments of warfare, referred to as "military optical instruments". This is not a fact. Carl Zeiss, Inc. was incorporated in 1925 and never at any time in the history of

its existence did it deal or was it concerned with the sale of any such instruments as are listed or any other instrument of any sort that would answer the description of military optical instruments. Its business is altogether confined to the sale of cameras, telescopes, microscopes and optical instruments as used in civil businesses. It never at any time carried any such instruments. The only charge against the defendant, Carl Zeiss, Inc., made by the government in the Anti-Trust suit was that the defendant, Carl Zeiss, Inc., had declined from importing, selling or dealing in such instruments because of certain agreements made between Carl Zeiss, Jena, and Bausch & Lomb Optical Company. 127

Paragraphs "Eighth" and "Ninth" make it clear that plaintiffs rely upon certain written agreements dated on or about April 28, 1921, June 27, 1925, September 28, 1925, November 26, 1926 and December 24, 1926. Copies of these agreements were examined by me at the time of the filing of the indictment against the defendant, Carl Zeiss, Inc., and they were all made between Bausch & Lomb Optical Company and Carl Zeiss, Jena. The agreement of April 28, 1921, upon which plaintiffs particularly rely, was made four years before Carl Zeiss, Inc. was incorporated. Carl Zeiss, Inc. never at any time had anything to do with any of these agreements, nor has Carl Zeiss, Inc. had at any time any dealings with Bausch & Lomb Optical Company in connection with the subject matter of these agreements. 128 129

Since the entry of the plea of *nolo contendere* on March 5, 1941, neither the defendant, Carl Zeiss, Inc., nor any officer in connection with it has ever been approached by the Government of the United States in connection with the sale of military optical instruments by Bausch & Lomb Optical Company or any other concern in the United States

dealing with such instruments. No consent decree or other arrangements have been made by the defendant, Carl Zeiss,
130 Inc., with the government or any official on its behalf with respect to the dealings in such instruments. Deponent is informed and believes that the agreements under which the indictment of the Sherman Anti-Trust Act was brought are in the possession of Bausch & Lomb Optical Company or Carl Zeiss, Jena, and that copies are on file in the proceedings brought by the United States Government against Bausch & Lomb Optical Company and that these can be furnished to the court by the attorneys representing the other defendants on the hearing of this motion.

An examination of the agreements will disclose that
131 no such provisions are contained in the agreement as they are alleged in paragraphs "Eighth" and "Ninth" of the complaint.

Accordingly it appears from the papers on file in this court that the charges in this complaint are untrue in material particulars. The fundamental basis of the action that Carl Zeiss, Inc. was a party to the agreement or dealt in the material covered by the complaint wholly fails to support the charges made.

The absurdity of making Carl Zeiss, Inc. a party to this action is apparent from an examination of paragraph "Tenth", which alleges that between April 28, 1921 and
132 March 29, 1940, the defendants received payments from the United States for the sale and delivery of such military optical instruments, when in truth and fact the defendant, Carl Zeiss, Inc., never sold or delivered a military optical instrument to any person in the United States of America, including the United States Government. The same fact applies to paragraphs "Eleventh", "Twelfth", "Thirteenth", "Fourteenth" and "Fifteenth" as the defendant, Carl Zeiss,

Inc., never at any time bid for any government contract for the importation into the United States of any military optical instrument or its sale, manufacture and delivery in the United States. 133

Deponent respectfully submits that this action should be dismissed as to the defendant, Carl Zeiss, Inc.

(Sworn to by Karl A. Bauer, January 6th, 1942.)

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Order to Show Cause Dated January 14, 1942.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

136 File No. Civ. 17-11

[SAME TITLE]

Upon the summons and complaint and Marshal's returns herein and upon the order to show cause, dated January 6, 1942, signed by Honorable Alfred C. Coxe, and the affidavits annexed thereto, and upon the annexed affidavit of Whitney North Seymour, sworn to the 14th day of January, 1942, and
137 the purported amended complaint, LET the plaintiffs herein and each of them show cause before this Court, at a Stated Term thereof to be held in Room 506, in the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on the 16th day of January, 1942, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be entered herein

1. As an additional ground for relief in connection with the motion made returnable by said order to show cause dated January 6, 1942, striking as sham and false
138 the complaint in this action pursuant to the provisions of Rule 11 of the Federal Rules of Civil Procedure and directing the institution of appropriate disciplinary action against the plaintiffs herein for wilful violation of said Rule.

2. (a) Determining that the purported amended complaint of the plaintiffs herein, of which a copy was de-

livered to the attorneys for the defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher on January 13, 1942, is a nullity. 139

(b) Denying leave to the plaintiffs herein to amend their complaint in accordance with said purported amended complaint.

or in the event that said motion designated 2(a) and (b) be denied, and the complaint is amended in accordance with said purported amended complaint,

3. (a) Dismissing this action and the amended complaint herein as against the defendants Bausch & Lomb 140
Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher on the ground that the venue of this action as to the said defendants has been improperly laid in the Southern District of New York.

(b) Dismissing this action and the amended complaint herein as against the said defendants on the ground that the amended complaint fails to state a claim against these defendants upon which relief can be granted.

(c) Granting summary judgment to these defen- 141
dants upon the ground that the complaint and amended complaint, the affidavits annexed to said order to show cause dated January 6, 1942, and the affidavit hereto annexed show that there is no genuine issue as to any material fact herein and that these defendants are entitled to judgment as against the plaintiffs as a matter of law,

and for such other and further relief as to this Court may seem just and proper, together with the costs of this action.

142 Sufficient cause appearing therefor, it is

ORDERED that the plaintiffs be and they hereby are stayed from taking any further proceedings in this action until final decision upon this motion and the motion made returnable by said order to show cause, dated January 6, 1942; and it is further

ORDERED that service of a copy of this order and the affidavit annexed thereto at the office of Emanuel Thebner, attorney for the plaintiffs, 111 John Street, Borough of Manhattan, City, County and State of New York, on or before

143 9:00 P. M. on January 14th, 1942, be deemed sufficient service hereof.

Dated, New York, N. Y., January 14th, 1942.

ALFRED C. COXE,
United States District Judge.

144

AFFIDAVIT OF WHITNEY NORTH SEYMOUR ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 14, 1942.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

145

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

WHITNEY NORTH SEYMOUR, being duly sworn, deposes and says:

146

I am an attorney and counsellor-at-law and a member of the firm of Simpson Thacher & Bartlett, attorneys for defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher in this action. This affidavit is submitted in support of a motion for the relief set forth in the annexed order to show cause by which this motion is made returnable.

On December 26, 1941, copies of the summons and complaint in this action were served upon the defendants Bausch & Lomb Optical Company (hereinafter sometimes called "Bausch & Lomb" for brevity), M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher, at Rochester, New York. On January 6, 1942, an order to show cause was signed by Honorable Alfred C. Coxe bringing on a motion on behalf of these defendants to dismiss the complaint for improper venue, failure to state a cause of action and also for summary judgment in favor of the defendants. The motion was made returnable by said order to show cause on January

147

Affidavit of Whitney North Seymour Read in Support of Order to Show Cause Dated January 14, 1942.

16, 1942. I respectfully refer to said order to show cause
148 and the affidavits annexed thereto with the same force and effect as if they were fully set forth herein.

At 5:30 P. M. on January 13, 1942, a representative of the office of Mr. Emanuel Thebner, attorney for the plaintiffs, delivered to the office of my said firm a copy of a paper purporting to be an amended complaint in this action. A copy of said purported amended complaint is annexed hereto, and, without conceding the correctness of any of the statements made therein, I respectfully ask that it be considered upon this motion and upon the motions brought on by the earlier order to show cause as an admission by
149 the plaintiffs and for all purposes except as an amended complaint. As promptly as possible said purported amended complaint will be returned to the office of the attorney for the plaintiff with a notice, copy of which is annexed hereto, stating that said document is a nullity and does not comply with Rule 15(a) of the Federal Rules of Civil Procedure.

Plaintiffs apparently now recognize, as was demonstrated by the affidavits in support of the motion brought on by the said order to show cause, dated January 6, 1942, that the complaint in this action is false in material particulars and that the defendants' motion addressed to it must be granted. In an effort to avoid decision on that motion, plain-
150 tiffs have served a purported amended complaint, without obtaining leave of the Court. Said purported amended complaint was not properly served as an amendment of the complaint as of course under Rule 15(a) because it was served after the service of defendants' motion to dismiss and for summary judgment. Accordingly, plaintiffs have wholly failed to comply with the requirements of Rule 15(a)

and the purported amended complaint is a nullity and defendants are entitled to a decision to that effect.

151 Since no amendment of the complaint has been made or authorized, defendants' original motion to dismiss and for summary judgment will be heard on the return of the order to show cause dated January 6, 1942. It is of extreme importance to the defendants that this action should be finally disposed of as promptly as possible without further harassment or annoyance to them.

It is clear from the annexed form of purported amended complaint that the original complaint in this action is false in material particulars and that the signing of that complaint by the attorney for the plaintiffs under the circum-
152 stances is a direct violation of Rule 11 of the Federal Rules of Civil Procedure. The flagrant violation of that Rule by the plaintiffs herein, both of whom are members of the Bar of this Court, requires that the complaint should be stricken as sham and false under the Rule and that appropriate disciplinary proceedings should be instituted against the plaintiffs.

The plaintiffs should not be allowed to avoid the inevitable dismissal of the complaint by any proceedings on their part seeking to delay disposition of the motion to dismiss and for summary judgment. The language of the purported amended complaint varies the cause of action so completely
153 and it so plainly fails to state a cause of action against these defendants that even if an application for leave to amend were made, it must necessarily be denied. Accordingly, by this motion defendants seek not only a determination that the purported amended complaint is a nullity but also relief against any dilatory attempt on the part of the plaintiffs to avoid final adverse disposition of this litigation.

Even if the complaint were to be deemed amended (which
154 for the reasons stated would be improper), it is clear that it would have to be dismissed and summary judgment granted to defendants upon the grounds set forth in the order to show cause annexed hereto. Accordingly, that relief is sought in the alternative, but only in the event that grounds 2(a) and (b) of this motion are denied.

This motion should be made returnable concurrently with the motion brought on by said order to show cause dated January 6, 1942, so that final disposition of the litigation may be had. Convenience of the Court indicates that both motions should be considered together, since the papers
155 on both motions must be examined on each. In view of the fact that the purported amended complaint was only served upon my firm on January 13, 1942, it is impossible to give the ordinary notice of motion and still have this motion returnable concurrently with the motions brought on by said order to show cause dated January 6, 1942. Accordingly, I respectfully request that the annexed order to show cause be signed, so that said motions may be heard and determined together on the return day of the original order to show cause herein. I also request that such order to show cause contain a stay of further proceedings on the part of the plaintiffs pending the return of this motion, so that no
156 further steps may be taken on their part to avoid final decision in the litigation. The moving defendants do not waive their objections to the bringing of this action in this District. On the contrary they insist upon that objection and this motion is made to prevent evasion by plaintiffs of prompt decision of that question and the other questions presented by this motion made returnable by the order to show cause dated January 6, 1942. Ground 1 of the present

motion is an additional ground for dismissal which the Court is asked to consider in connection with the defendants' earlier motion. The violation of Rule 11 by plaintiffs, to which attention is called by that ground, has now become so apparent that it ought not to be overlooked by the Court. 157

No previous application has been made for the relief sought herein.

WHEREFORE I respectfully request that an order to show cause in the form annexed hereto be signed and that this motion be granted so far as may be appropriate.

(Sworn to by Whitney North Seymour, January 14th, 1942.) 158

AMENDED COMPLAINT ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 14th, 1942 HAS BEEN PRINTED HEREIN AT PAGE 78.

159

Notice of Rejection.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

160

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE that the undersigned hereby return and reject as a nullity the annexed purported amended complaint in this action because said purported amended complaint and the service thereof do not comply with Rule 15(a) of the Federal Rules of Civil Procedure in that said purported amended complaint was not served before a responsive pleading to the complaint was served and neither leave
161 of the Court nor written consent of the adverse party was obtained, and upon the further ground that said purported amended complaint fails to comply with the requirements of the Federal Rules of Civil Procedure in any respect.

Dated, New York, N. Y., January 14, 1942.

Yours, etc.,

SIMPSON THACHER & BARTLETT,
Attorneys for Defendants,
Bausch & Lomb Optical Company,
M. H. Eisenhart, Carl L. Bausch and
162 Theodore B. Drescher,
Office and Post Office Address,
120 Broadway,
Borough of Manhattan,
New York, N. Y.

To:

EMANUEL THEBNER, ESQ.,
Attorney for Plaintiffs,
111 John Street,
New York, N. Y.

Affidavit of Service of Jack Kemp Busby.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
File No. Civ. 17-11

163

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JACK KEMP BUSBY, being duly sworn, deposes and says:

I am an attorney and counsellor at law associated with the firm of Simpson Thacher & Bartlett, attorneys for the defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher in this action; that I am over the age of twenty-one years and reside at The Hampshire House, 150 Central Park South, in the Borough of Manhattan, City, County and State of New York, and that I am not a party to this action; that on the 14th day of January, 1942, at or about 1:20 o'clock in the afternoon of that day, I served personally upon Emanuel Thebner, attorney for plaintiffs in this action, at his office at No. 111 John Street, in the Borough of Manhattan, City, County and State of New York, an original Notice of Rejection, of which a true copy is hereto annexed, to which was attached a copy of a purported amended complaint of the plaintiffs in this action, said copy being the same paper which was delivered by a representative of the office of Mr. Emanuel Thebner at the office of Messrs. Simpson Thacher & Bartlett at or about 5:30 P. M. on January 13, 1942, by personally giving to and leaving with the said Emanuel Thebner the aforesaid original Notice of Rejec-

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165

tion herein with the aforesaid copy of purported amended complaint annexed thereto.

166 Deponent further says that at the same time and place as aforesaid he served personally upon said Emanuel Thebner the order to show cause of Hon. Alfred C. Coxe herein, dated January 14, 1942, to which was annexed the affidavit of Whitney North Seymour, verified January 14, 1942, a true copy of the aforesaid purported amended complaint and of the aforesaid Notice of Rejection, by personally exhibiting to the said Emanuel Thebner the aforesaid order to show cause, affidavit of Whitney North Seymour, copy of purported amended complaint and copy of Notice of Rejection, and personally leaving with the said Emanuel Thebner true

167 copies thereof.

(Sworn to by Jack Kemp Busby, January 14th, 1942.)

168

Order to Show Cause Dated January 14, 1942.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

169

UNITED STATES OF AMERICA on the relation of MURRAY BRENSILBER and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, in their own behalf,

Plaintiffs,

—against—

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER,

170

Defendants.

On the summons and complaint herein and upon the Marshal's returns herein, the notice of motion herein made by the defendant, Carl Zeiss, Inc., dated January 6, 1942, returnable the 16th day of January, 1942, for an order under

171

Order to Show Cause Dated January 14, 1942.

Rule 12 of the Rules of Civil Procedure dismissing the action and the complaint herein as to the said defendant,
172 Carl Zeiss, Inc., on the ground that the complaint fails to state a cause of action and granting summary judgment under Rule 56 of the Rules of Civil Procedure, and upon the annexed affidavit of Joshua D. Jones, verified the 14th day of January, 1942, and the purported amended complaint herein;

LET the plaintiffs herein and each of them show cause before this Court at a Stated Term for the hearing of motions to be held in Room 506 of the United States Court House, Foley Square, in the Borough of Manhattan, City, County
173 and State of New York, on the 16th day of January, 1942, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be entered herein granting to the defendant, Carl Zeiss, Inc., the relief prayed for in the said notice of motion herein, dated January 6, 1942, and as an additional ground for relief in connection with said motion,

(a) Striking out as sham and false the purported amended complaint and directing the institution of appropriate disciplinary proceedings of the plaintiffs herein for wilful violation of the Rules of Civil Procedure of this Court, and

174 (b) Directing the proposed amended complaint of the plaintiffs herein, of which a copy was delivered to the attorneys for the defendant, Carl Zeiss, Inc., on January 13, 1942, is a nullity, and

(c) Denying leave to the plaintiffs herein to amend the complaint in accordance with the said purported amended complaint, and

(d) In the event that the said motion be denied and that the plaintiffs' complaint be amended in accordance with the proposed amended complaint,

175

1. Dismissing the amended complaint herein under Rule 12 of the Rules of Civil Procedure on the ground that the said amended complaint fails to state a cause of action against the defendant, Carl Zeiss, Inc., and

2. Granting summary judgment under Rule 56 of the Rules of Civil Procedure on the ground that the said amended complaint shows that there is no genuine issue as to any material fact therein and that the defendant, Carl Zeiss, Inc., is entitled to judgment as a matter of law, and for such other and further relief as may be just and proper, together with the costs of this motion, and sufficient cause appearing therefor, it is

176

ORDERED that the time of the defendant, Carl Zeiss, Inc., to answer the complaint or amended complaint herein be and the same hereby is extended to and including ten days after the entry of an order disposing of this motion; and it is further

ORDERED that service of a copy of this order and the affidavit annexed, at the office of Emanuel Thebner, attorney for the plaintiffs, 111 John Street, Borough of Manhattan, City, County and State of New York, on or before 6:00 P. M. January 14, 1942, be deemed sufficient service hereof.

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Dated, New York, N. Y., January 14, 1942.

ALFRED C. COXE,
United States District Judge.

AFFIDAVIT OF JOSHUA D. JONES ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 14, 1942.

178 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JOSHUA D. JONES, being duly sworn, deposes and says:

179 I am an attorney associated with Gifford, Woody, Carter & Hays, the attorneys for the defendant, Carl Zeiss, Inc., and I have personal charge of this action. This action was commenced against the defendant, Carl Zeiss, Inc., by the filing of the summons with the Clerk of this Court on December 17, 1941, and the service of a summons and complaint on the defendant, Carl Zeiss, Inc., on December 31, 1941.

Thereafter on January 7, 1942, I prepared and caused a notice of motion to be served on Emanuel Thebner, Esq., the attorney for the plaintiffs, dated January 6, 1942, returnable before this Court on January 16, 1942, asking for an order dismissing the complaint herein on the ground that it
180 did not state a cause of action against the defendant, Carl Zeiss, Inc., and asking for summary judgment in favor of the defendant, Carl Zeiss, Inc., under Rule 56 of the Rules of Civil Procedure on the ground that there was no genuine issue or any material fact in dispute.

To this notice of motion was attached the affidavit of Karl A. Bauer, president of Carl Zeiss, Inc., verified January 6, 1942, in which it was stated that the material allegations

of the complaint to the effect that the individual defendants were officers of Carl Zeiss, Inc.; that Carl Zeiss, Inc. had
181 entered into a conspiracy with Bausch & Lomb Optical Company to charge the United States Government excessive prices on the sale of military optical instruments and had collected excessive prices for such materials and filed bills, vouchers and invoices which were false and fictitious, which allegations were absolutely false, and that Carl Zeiss, Inc. never at any time manufactured, sold, delivered or dealt in military optical instruments of any kind and that they had never at any time sold or did business with the United States Government in such instruments, and that this was disclosed in a proceeding brought by the United States
182 Government in this Court against Bausch & Lomb Optical Company and the defendant, Carl Zeiss, Inc., for violation of the Sherman Anti-Trust Act.

The original notice of motion, dated January 6, 1942, and returnable January 16, 1942, with the affidavit of Karl A. Bauer attached thereto was duly filed with the Clerk of this Court for the hearing of the motion on the 16th.

Yesterday, shortly after 5:00 o'clock, there was left at the office of Gifford, Woody, Carter & Hays, what purports to be an amended complaint, undated and unverified, correcting the statements contained in the original com-
183 plaint, the falseness of which had been sworn to in the affidavit of Karl A. Bauer, annexed to the notice of motion.

The plaintiffs have failed to serve any opposing affidavits in opposition to defendant's motion for summary judgment and have served what purports to be an amended complaint, the allegations of which in all respects establish the truth of the statements made in the affidavit of Karl A.

Affidavit of Joshua D. Jones Read in Support of Order to Show Cause Dated January 14, 1942.

Bauer that the allegations of the original complaint are
184 false.

The purported amended complaint does not correct the defects in the original complaint, for which it is claimed that it should be dismissed on the ground that it does not state a cause of action. In addition to that, it conclusively establishes that there is no issue to be determined in this action and that summary judgment should be granted in favor of the defendant, Carl Zeiss, Inc., as asked for in the notice of motion, dated January 6, 1942.

Deponent respectfully submits that there is no procedure under Rule 15 of the Rules of Civil Procedure under which
185 a plaintiff can serve an amended complaint in answer to a motion for summary judgment; and further, that under Rule 11 of the Rules of Civil Procedure, the attorney for the plaintiff is subject to appropriate disciplinary action for filing pleadings obviously containing matter which he knows not to be correct and at least would never have been alleged if there had been a casual examination of the papers on file in this Court which formed the basis of the action against the defendant, Carl Zeiss, Inc.

Attached hereto and marked Exhibit "A" is a copy of the proposed amended complaint received on January 13, 1942.

No previous application for similar relief has been made.

186

WHEREFORE it is respectfully requested that an order to show cause in the form annexed hereto be signed bringing this motion for a hearing on January 16, 1942 at the same time and place as the motion, dated January 6, 1942, is returnable, and further extending the time of the defendant, Carl Zeiss, Inc., to answer the complaint or the proposed

Affidavit of Joshua D. Jones Read in Support of Order to Show Cause Dated January 14, 1942.

amended complaint herein until ten days after an order upon said motion; and further ordered that service of a copy of this order and the affidavit and exhibit annexed thereto at the office of Emanuel Thebner, Esq., the attorney for the plaintiffs, 111 John Street, Borough of Manhattan, City, County and State of New York, on or before 6:00 o'clock on January 14, 1942, shall be deemed sufficient service thereof. 187

(Sworn to by Joshua D. Jones, January 14th, 1942.)

AMENDED COMPLAINT ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 14TH, 1942 HAS BEEN PRINTED HEREIN AT PAGE . 188

SIMILAR NOTICE OF REJECTION, DATED JANUARY 14, 1942, HAS BEEN PRINTED HEREIN AT PAGE 54.

189

Opposing Affidavit of Emanuel Thebner.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

190

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

EMANUEL THEBNER, being duly sworn, deposes and says: I am one of the plaintiffs in the above entitled action and also the attorney of record for the plaintiffs.

This affidavit is made in answer to the motion of the de-
191 fendants by order to show cause dated January 14, 1942. The defendants seek by their application: (1) An order striking out the complaint as sham and false; (2) an order directing the institution of disciplinary proceedings against the plaintiffs; (3) declaring the amended complaint to be a nullity; and (4) denying leave to amend, if leave be necessary, and in the alternative, if the amendment of the complaint be deemed proper, then that the Court enter an order, (a) dismissing the action of the amended complaint on the ground that the venue is improper; (b) that the amended complaint does not state a cause of action; and (c) granting summary judgment to the defendants on the
192 ground that there is no genuine issue and no cause of action as to any material fact.

The original complaint in this action filed in this Court on December 17, 1941 and the amended complaint filed January 14, 1942 are neither sham nor false. The ultimate facts and conclusions therein set forth are amply supported by the indictment against the defendants herein by the United

States Grand Jury in and for the Southern District of New York, at the March 1940 Term (C. 107-169); the two bills of particulars filed by the United States Attorney General in said criminal action; and the complaint in equity of the United States Government; and the consent decree entered in said action now on file in this Court (Civil 9-404), all of which are made a part of this affidavit. 193

Revised Statutes of the United States §§3490-3494 (31 U. S. C. 231-235) specifically permit the plaintiffs as citizens to institute and prosecute this action. This action was in fact instituted by plaintiffs pursuant to said statutes and in absolute good faith. The plaintiffs verily believe and are of the opinion that by reason of the unlawful acts of the defendants, the defendants did, in fact, defraud the Government of the United States of large sums of money, as deponent verily believes. 194

Deponent did not wilfully violate any of the provisions of the Federal Rules of Civil Procedure in any way, shape or form, and in particular Rule 11. The plaintiffs here and now state unequivocally that the charge of the defendants that deponent signed the complaint which is alleged was false in material particulars and that deponent knew it to be false, is totally untrue, unfair and unwarranted; and the request for the institution of disciplinary action against deponent and the plaintiffs is equally unfair and unwarranted.

195

Plaintiffs respectfully submit that the defendants' contention that the amended complaint is a nullity is totally without substance and merit. Rule 15A of the Federal Rules of Civil Procedure entitles the plaintiffs to serve an amended complaint once as of course within twenty days after service of the complaint.

Opposing Affidavit of Emanuel Thebner.

The records of this Court show that the original complaint was served on Bausch & Lomb and the individual
196 defendants on December 26, 1941, and on Carl Zeiss, Inc., on December 31, 1941. Since the plaintiffs had twenty days thereafter to amend their complaint, once as of course, pursuant to said Rule 15A, the time within which to do such act did not expire until January 15th and January 20th, 1942, respectively.

It is conceded that the amended complaint was duly served on January 13th, 1942 and was duly filed in the Clerk's office of this Court on January 14, 1942.

The motions of the defendants are not "responsive pleadings" within the provisions of Rule 7A. Therefore, the
197 plaintiffs had the clear right to amend their complaint, once as of course, without obtaining the prior leave of this Court. This was recognized by Mr. Seymour, defendant's counsel by requesting an extension of time to answer and by the order to show cause dated January 6, 1942 containing such relief. Mr. Seymour there virtually admits that the defendants, in their application, have not submitted any responsive pleading. The only responsive pleading to a complaint allowed under Rule 7A, is an answer, and no answer had been served.

It is therefore clear that the plaintiffs were within their rights in serving the amended complaint and that the service
198 thereof was duly made pursuant to the Federal Rules aforesaid.

Plaintiffs further respectfully submit that in view of the proper service of the amended complaint in this action, the defendants' original motions under the order to show cause of January 6th, 1942, become academic and should not now be entertained by this Court.

Opposing Affidavit of Emanuel Thebner.

Defendants are not entitled to the alternative relief under the order to show cause obtained by the defendants on January 14th, 1942, being the relief they had applied for by order to show cause of January 6th, 1942. 199

Rule 56c of the Federal Rules of Civil Procedure provides that a motion for summary judgment must be served at least ten days before the time specified for the hearing.

Plaintiffs submit that this statutory time allowed the opposition until the hearing of the motion for summary judgment may not be cut down without the consent of the adverse party. The plaintiffs do not consent to any lesser time than that provided for in Rule 56C and do not consent to such a hearing now.

It is respectfully submitted that plaintiffs are entitled under the Rules of Civil Procedure §§26, 31 and 37, to apply for examination before trial, discovery and inspection and pre-trial relief even before answer. 200

The granting of the ex-parte stay in the order of January 14, 1942 without notice to the plaintiff and without giving them an opportunity to be heard was prejudicial to them under the aforesaid respects.

The unfairness of Mr. Seymour in making the charges is further manifest by the fact in obtaining the order to show cause, he also procured a stay of this Court on the part of the plaintiffs from taking any further proceedings in this action until the final decision upon this motion and the prior motion made by the order to show cause dated January 6th, 1942. 201

It is obvious that the effect was to prevent the plaintiffs and deponent from properly preparing to meet the prior motion, which is also renewed on this application as for alternative relief to dismiss the complaint and for summary judgment.

The plaintiffs, therefore, request that the stay be vacated and that should this Court entertain the application for alternative relief, notwithstanding the service of the amended
202 complaint, that the hearing of that application be set for a date sufficient in advance to give deponent an opportunity to properly prepare to oppose such application.

The moving papers on this application are entirely inaccurate in the statements charging falsity to certain of the allegations of the complaint. In reality it will be noted from a reading of the affidavit of Mr. Herbert Eisenhart, verified January 5, 1942, submitted on the pending prior motion, that they raise issues of fact and give their own version which is contrary to the matters alleged in the
203 indictment.

One of the attacks upon the alleged falsity of the complaint is that it appears from the face of the agreements between the defendants Bausch & Lomb Optical Company and Carl Zeiss, Jena, Germany that Carl Zeiss, Inc. is not a party thereto.

As a matter of fact, however, and as a matter of law, it is respectfully submitted that that fact would not prevent proof that other parties not named in the contract, were or became liable thereon even if the cause of action were based upon the contract, which is not the fact. Plaintiffs' cause of action as stated before and alleged in the complaint, is
204 for fraud practiced on the United States Government. That could be established from the other allegations of the complaint even without the allegations of the conspiracy. In other words, plaintiffs' theory of the case under T. 31 (U. S. C. §§231-235) was two-fold. The fraud committed on the government may be by making or causing to be made of false claim against the government or obtaining the pay-

ment or allowance of any claim, knowing it to be false or fraudulent. Both these alternatives were set forth in the complaint.

205 The principal attack upon the complaint is that Carl Zeiss, Inc. was not physically a party to the contracts between Bausch & Lomb Optical Company and Carl Zeiss, Jena, Germany. The exclusion from the original complaint of reference to Carl Zeiss, Jena, Germany was because there was an absolute identity between Carl Zeiss, Inc. and Carl Zeiss, Jena, Germany, which could be proven by factual evidence as appears from the indictment aforesaid as a matter of fact and as a matter of law, it would appear to have been unnecessary because the charge in the complaint was that of tort and Carl Zeiss, Inc. as a tort feasor. That 206 in so doing it was an agent is entirely immaterial, as an agent is liable for tort as well as the principal.

As to the factual matter, deponent desires to call to the attention of the Court the following which are not mentioned in the moving affidavits. Paragraph "7" of the indictment states:

> "Whenever it is hereinafter alleged in this indictment that the defendant Zeiss did do, or perform any act or thing, the said allegation shall be deemed to mean that the said act or thing was done by Zeiss, either in its own name or, or through the instrumentality and agency of Nedinsco or Carl Zeiss, Inc." 207

Insofar as anything stated in the indictment relates or tends to charge a violation of the Sherman Anti-Trust Act or the Wilson Tariff Act by the involvement of interstate or foreign commerce, it is principally in that connection that Carl Zeiss, Jena, Germany had a bearing in the indictment.

Opposing Affidavit of Emanuel Thebner.

Insofar as this action is concerned, Carl Zeiss, Inc., which was and is to all intents and purposes, Carl Zeiss, Jena,
208 Germany, is the only party that was necessary to plead in this action as a tort feasor.

In this connection, we call attention to the following statements in the indictment:

Par. 4: "For a number of years, including the three years next preceding the date of the return of this indictment, Zeiss has carried on business in the Borough of Manhattan, City of New York, and within the Southern District of New York, through the instrumentality and agency of Carl Zeiss, Inc., a corporation organized on or about
209 December 11th, 1925, and existing by virtue of the laws of the State of New York, *which is a wholly owned subsidiary of Zeiss, and is completely dominated, controlled, and operated by Zeiss.*" (Italics ours.)

Par. 19: "* * * Bausch & Lomb and Zeiss for many years have manufactured and distributed and now manufacture and distribute and sell in the aggregate the greater part of all military optical instruments manufactured and sold in the world."

210 The Court will note according to the preamble first above mentioned this must be construed as well that Carl Zeiss, Inc. manufactured and distributed.

Par. 11: "Bausch & Lomb manufactures military optical instruments at its plant in Rochester, New York, for sale and shipment in interstate commerce principally to the United States Government * * *"

Opposing Affidavit of Emanuel Thebner.

Par. 14: "* * * Bausch & Lomb and Zeiss (meaning as well Carl Zeiss, Inc., as per preamble) have been engaged in importing military optical instruments into the United States through the Port of New York in the said Southern District of New York." (Matter in parentheses ours.) 211

In paragraph "17" of the indictment it is alleged that the agreement of April 28, 1921 was supplemented on June 27, 1925 and again on October 28, 1925 and further states as follows:

"To modify the provisions of paragraph 2 with respect to royalty payments and to modify paragraph 3 so as to specify the circumstances under which Bausch & Lomb and Zeiss (meaning Carl Zeiss, Inc. as per preamble) could make quotations on military optical instruments, the eventual designation of which was the territory of the other, it being agreed that such a quotation could be made only with the consent of the other party to the agreement, and that the price quoted should be agreed upon by Zeiss (meaning Carl Zeiss, Inc. as per preamble) and Bausch & Lomb. Bausch & Lomb and Zeiss (meaning Carl Zeiss, Inc. as per preamble) agreed that if either were requested to make bids by any government on military optical instruments intended for use in the territory allotted the other, the requested quotation would contain a mark-up over the bidders regular price up to 20% of said regular price, which excess was intended to throw the business to the party to whom the territory was allotted and, in case such bid were successful, the excess was to be paid by the successful bidder to the other contracting party." (Matter in parentheses ours.) 212 213

The modifications of the agreement of 1921 are further set forth in 17-d of the indictment, which paragraph concludes as follows:

214

> "Notwithstanding this change in the form of April 28th, 1921 agreement as supplemented, Bausch & Lomb and Zeiss intended and continued to carry out the terms of Paragraph 3 and 9 of the April 28th, 1921 agreement as supplemented in 1925."

These new modification agreements were made on November 26th, 1926 and on December 24th, 1926, respectively, which period of time is approximately one year after the incorporation of Carl Zeiss, Inc.

215 As the Court will undoubtedly read the indictment in connection with this affidavit, it is not necessary to continue further quoting therefrom.

A reference to the amended complaint by comparison with the original, indicates except for a single correction which was an inadvertent error in stating that the three individual defendants who it is conceded were officers and directors of Bausch & Lomb, Inc., was mistakenly stated to be also officers and directors of Carl Zeiss, Inc. All of the other additional allegations are in the nature of evidentiary matters that could have been proven upon the trial under the original complaint, but out of abundance of caution and to meet the hypercritical attack of the com-
216 plaint, it was deemed better to serve an amended complaint. The basic cause in all respects to wit: the conspiracy and the fraud and the parties are all the same.

In substance, the amended complaint by addition and changes were to the following effect:

(1) Wherever Carl Zeiss, Inc. was referred to as having

agreed, we now allege it to be Carl Zeiss, Jena, Germany, the party mentioned on the face of the agreement.

(2) The showing of the complete control and domination of Carl Zeiss, Inc. by Carl Zeiss, Jena, Germany. 217

(3) The allegation that the acts and matters referred to in the complaint were carried out through the instrumentality and agency of Carl Zeiss, Inc., in substance the same as in the indictment.

A change was also made instead of whereas it is alleged in the original complaint that all bids would contain a mark-up up to 20% over the regular price, it is alleged in the amended complaint in paragraph "11" that 218

> "A sum of money equal to a percentage of the gross sales price of each military optical instrument sold by Bausch & Lomb to the Government of United States, the said sum of money to be paid irrespective of whether the fees of military optical equipment so sold was covered in whole or in part by patents owned by Zeiss."

The indictment has a similar allegation (paragraph 17-b).

Mr. Eisenhart in his affidavit of January 5, 1942 at page 8 states that Judge Goddard had asked Mr. Isseks whether any charge of fraud was involved, Mr. Isseks replied as follows: 219

> "No, sir, there is no charge of fraud against the defendants in connection with the acts complained of in the indictment."

This isolated sentence does not truly represent the position of the Assistant United States Attorney General.

220 Mr. Isseks, however, upon further question by the Court as to why he should impose the maximum fine, shows that he meant by the statement, "that there was no fraud involved." Mr. Isseks said:

> "Your Honor I think the acts are sufficiently culpable, although not involving acts of coercion or threats to warrant the imposition of the maximum fine. This continued from 1921 to date, and the penalty imposed, if the penalty imposed by the maximum fine will be small compared to what the government would consider
> 221 the defendant Bausch & Lomb has derived as benefits, and of course its officers, and I think that the reason itself is sufficient for your Honor in imposing the maximum fine."

The statement in Mr. Eisenhart's affidavit at page "9" charging that plaintiffs have seen fit to distort the earlier charges made by the government counsel and then proceeding to refer to the fact that Carl Zeiss, Inc. was not a party to the contract and at page "11" stating that Bausch & Lomb had no dealings with Carl Zeiss, Inc. manifests that defendants were attempting to get what may be said as "snap judgment" on the technicality that Carl Zeiss, Inc. was not,
222 on the face of the contract, a party thereto.

Without repeating what has already been said in that connection, showing that the criticism is not justified, there is presented questions of fact both as to the liability of Carl Zeiss, Inc. and as to whether Bausch & Lomb had dealings with Carl Zeiss, Inc. in connection with the matters alleged in the complaint. The indictment clearly supports the allegations of the complaint in both these respects.

Opposing Affidavit of Emanuel Thebner.

Mr. Eisenhart in his affidavit at page "10" in paragraph "2", says:

"Paragraph '8' and '9' of the present complaint alleged that defendant Bausch & Lomb on or about April 28, 1921 and the defendant Carl Zeiss, Inc. from on or about December 11, 1925 (together with the individual defendants alleged to be, but not in fact officers and directors of Carl Zeiss, Inc.), entered into conspiracy, etc." 223

The allegation of paragraph "8" of the complaint in that connection is as follows:

"The defendant Bausch & Lomb Optical Company from on or about April 28, 1921 and the defendant Carl Zeiss, Inc. from the date of its incorporation, on or about December 11, 1925 and the individual defendants since the time they became officers and directors of said corporation * * *" 224

In conclusion, plaintiffs respectfully state that their position herein taken with regard to the consideration of the motion for summary judgment at this time is not in order to avoid a decision either as to the sufficiency of the original or as to the sufficiency of the amended complaint nor as to the passing upon the motion for summary judgment, but each be taken up in due order according to the course and practice of this Court. 225

The foregoing matters in this affidavit were primarily addressed to the motion made by the defendant Bausch & Lomb Optical Company and the individual defendants. A like motion has also been made by the defendant Carl Zeiss,

Inc. To avoid duplication, we respectfully ask that this affidavit be read in opposition to both of said motions with
226 the same force and effect as if a separate affidavit was filed in the Carl Zeiss, Inc.'s motion.

WHEREFORE, deponent respectfully prays as follows:

1. That the motions of all the defendants instituted by orders to show cause dated January 14th, 1942 be denied in all respects.

2. That the motions of all the defendants made by order to show cause dated January 6, 1942 and by notice of motion dated January 6, 1942, be denied in all respects.
227

3. That the stay contained in the order to show cause dated January 14, 1942 be vacated in all respects.

4. That the amended complaint be declared to have been properly and timely served and is a valid and subsisting pleading on the part of the plaintiffs herein.

5. In the event that the Court should not see fit to deny the motion for alternative relief under the orders to show cause of January 14, 1942 which was originally made by the defendants under the order to show cause dated Jan-
228 uary 6th, 1942 and on notice of motion dated January 6, 1942, that the hearing be deferred for a reasonable time so that the plaintiffs would have an opportunity to prepare their opposition to said motion.

(Sworn to by Emanuel Thebner, January 15th, 1942.)

Opposing Affidavit of Murray Brensilber.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK 229

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

MURRAY BRENSILBER, being duly sworn, deposes and says: I am one of the plaintiffs in this action.

That I have read the annexed affidavit of Emanuel Thebner and that the same is true in all respects. That I reiterate the statements therein made as if herein repeated verbatim. 230

(Sworn to by Murray Brensilber, January 15th, 1942.)

231

Amended Complaint.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

232

[SAME TITLE]

Plaintiffs complaining of the defendants, for their amended complaint, respectfully allege as follows:

First: That the plaintiffs are and at all times herein mentioned were, and each of them is a citizen of the United States of America and of the State of New York, and each of them is a resident of the State of New York.

233

Second: The plaintiffs bring this action in behalf of the United States of America and in their own behalf by virtue of and pursuant to United States Revised Statutes Sections 3490-3494 (31 U. S. C. 231-235). The matter in controversy exceeds, exclusive of interest and costs, the sum of $3000.00.

Third: Upon information and belief that the defendant, Bausch & Lomb Optical Company, hereinafter called Bausch & Lomb is a corporation organized and existing under the Laws of the State of New York and has maintained and
234 now maintains an office and place of business in the Borough of Manhattan, City of New York within this Southern District of New York, and has transacted business and now transacts business within said District.

Fourth: Upon information and belief, Carl Zeiss, Inc. is a corporation organized and existing under the Laws of the State of New York and has maintained and now main-

tains its principal place of business and office in the Borough of Manhattan, City of New York within this Southern District of New York, and has transacted business and now transacts business within said District. 235

Fifth: Upon information and belief, Carl Zeiss (hereinafter called Zeiss), is a corporation or association existing under and by virtue of the Laws of Germany, and has its principal place of business in Jena, Germany, and for many years has been engaged in the business of manufacturing military optical instruments at its plant in Jena, Germany, and distributing and selling those instruments in Germany and in other countries in the world.

Sixth: Upon information and belief, the defendant Carl Zeiss, Inc. is a wholly owned subsidiary of Carl Zeiss, Jena, Germany, and is dominated. controlled and operated by the said Carl Zeiss, Jena, Germany. 236

Seventh: Upon information and belief, Carl Zeiss, Jena, Germany, has carried on business in the Borough of Manhattan, City of New York, and within the Southern District of New York through the instrumentality and agency of Carl Zeiss, Inc., a New York corporation.

Eighth: Upon information and belief, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher, are and each of them is and was during the greater part of the times herein mentioned, associated with Bausch & Lomb, and has held and at the present time hold the position of an officer or director of said corporation and were and are actively engaged in the management, direction and control of the affairs and policies of said corporation. 237

Ninth: Upon information and belief that the said Bausch & Lomb and Carl Zeiss, Jena, Germany, are and were at the
238 times herein mentioned engaged in the business of Manufacturing and selling various instruments, among others, periscopes, range finders, altimeters, bore-sights, bomb-sights, torpedo directors, sights for guns and other scientific optical instruments (except binoculars) used to direct and control the firing of modern instruments of warfare, hereinafter referred to as "military optical instruments".

Tenth: Upon information and belief the United States Government purchased such military optical instruments for use on battleships, cruisers and submarines, and for use
239 with aircraft and artillery.

Eleventh: Upon information and belief the defendant, Bausch & Lomb and Carl Zeiss, Jena, Germany, from on or about April 28, 1921, and the defendant, Carl Zeiss, Inc., from the date of its incorporation, on or about December 11, 1925, and the individual defendants since the time they became officers or directors of said Bausch & Lomb, together with other persons to the plaintiffs unknown, have been continuously engaged during and throughout the periods of time aforesaid, and up to and on about March 29, 1940, in an unlawful combination and conspiracy to sup-
240 press and limit competition between themselves by agreeing (a) to divide the world market for military optical instruments into certain geographical areas, the exclusive territory of Bausch & Lomb to be the United States of America, and the exclusive territory of Zeiss to be the rest of the world; (b) not to sell directly or indirectly such instruments for use in the area or territory allotted to the other without the prior consent of the other; (c) in the case of

sales made by consent for use in the territory of the other, to fix, maintain, and control arbitrary, artificial and unreasonable prices and terms of sale of such military optical instruments; and that in consideration of the obligations assumed by Zeiss, as aforesaid, Bausch & Lomb agreed, among other things, to pay to Zeiss for a period of twenty-five (25) years from May 1, 1921, a sum of money equal to a percentage of the gross sales price of each military optical instrument sold by Bausch & Lomb to the Government of the United States, the said sum of money to be paid irrespective of whether the piece of military optical equipment so sold was covered in whole or in part by patents owned by Zeiss. 241

Twelfth: Upon information and belief, that at all times subsequent to on or about December 11, 1925, and to and including on or about March 29, 1940, Carl Zeiss Inc. has refused to sell military optical instruments for use in the United States and thereby aided and abetted the furtherance of the combination and conspiracy herein alleged. 242

Thirteenth: Upon information and belief, between April 28, 1921 and March 29, 1940, the combination and conspiracy hereinbefore alleged has been operated and carried out in part within the Southern District of New York and said defendant, Bausch & Lomb and Carl Zeiss, Jena, Germany, have, by their concerted action aforesaid, sold, shipped and delivered military optical instruments to the Government of the United States at arbitrary, artificial and unreasonable and non-competitive prices agreed upon by the defendant, Bausch & Lomb with Carl Zeiss, Jena, Germany, and said defendant, Bausch & Lomb has received payments from the United States Government for the sale and delivery of 243

such military optical instruments which they divided between them in accordance with their said agreements.

244 Fourteenth: Upon information and belief that in pursuance of said conspiracy, combination and agreements by Bausch & Lomb and its co-conspirators, Bausch & Lomb severally at various times between May 1921 and March 1940, did submit to the Government of the United States bids for contracts for the manufacture and sale of military optical instruments and other articles and materials to be used by the United States Government in the War, Navy and other departments and bureaus of the Government. Such bids were at prices that pretended to be and were represented to be, and which the Government of the United
245 States and its authorized representatives believed to be, the normal, prevailing and competitive prices of such military optical instruments. Such bids, were, in fact, not the normal, prevailing and competitive prices therefor, but were in excess of the normal, prevailing and competitive prices for such military optical instruments. The officers authorized to accept such bids and enter into such contracts of sale and make such purchases on behalf of the Government of the United States, the Treasury, War and Navy Departments respectively, were without knowledge of the conspiracy, combination and agreements aforesaid, entered into by the defendants, and accepted various bids submit-
246 ted by the defendant Bausch & Lomb at various times, the exact dates of which are presently unknown to the plaintiffs, for manufacture and sale and the sale of military optical instruments to the Government of the United States. The said officers on behalf of the Government of the United States, its Treasury, War and Navy Departments, did make various purchases from time to time, the exact dates of which are unknown to the plaintiffs, of such

instruments, articles and materials to be supplied to the War and Navy Departments in large quantities and amounts, the exact prices, amounts and particulars of which are presently unknown to the plaintiff. 247

Fifteenth: Upon information and belief that at various times between May 1921 and March 1940, the defendants, by carrying out the combination and conspiracy hereinbefore described, have exacted arbitrary, artificial, unreasonable and non-competitive prices from the Government of the United States, in connection with the sale to it of military optical instruments. The defendants, other than Carl Zeiss Inc., severally and from time to time, the exact dates being at present unknown to the plaintiffs, have presented for payment and approval to various officers of the Civil Military and Naval service of the United States, bids, claims, invoices, bills, vouchers and statements and accounts against the United States for purchase of military optical instruments, upon the aforesaid bids, contracts and sales in large sums of money, the exact amount of which is at present unknown to the plaintiffs. The defendants, knew that such bids, claims, invoices, bills, vouchers, statements and accounts were excessive, false, fictitious and fraudulent by reasons aforesaid, in that said defendants added to the normal, prevailing and competitive prices, an arbitrary amount pursuant to the conspiracy, combination and agreements between the defendants aforesaid, and said claims, bills, statements and accounts were respectively paid and satisfied. 248 249

Sixteenth: Upon information and belief the individual defendants and each of them, and Carl Zeiss Inc. participated in and aided and abetted in the matters and things herein alleged.

Seventeenth: Upon information and belief, such bids, claims, invoices, bills, statements and accounts which contained the arbitrary amounts added to the regular prices
250 that were presented by the defendants, other than Carl Zeiss Inc. and which they caused to be presented for payment and approval, and obtained payment thereof from the Government of the United States, the Treasury, Navy and War Departments, respectively for the period from November 1937 to December 1938, amounted in the aggregate, and was equal to about the sum of $8,000,000. in which said sums the defendants are indebted to the United States Government, and various other sums of money in other years, the exact amount of which is at present un-
251 known to the plaintiffs, for which said sums the defendants are indebted to the United States Government.

Eighteenth: Upon information and belief, the aforesaid agreements, acts and conduct of the defendants constituted a fraud upon the United States of America and were and are against the Public Policy, and were a violation of the Revised Statutes of the United States, §§3490-3494 (U. S. C. 231-235).

Nineteenth: Upon information and belief the aforesaid agreements by and between the defendant, Bausch & Lomb, and Carl Zeiss, Jena, Germany, and the acts and conduct
252 of Carl Zeiss, Inc. and the individual defendants, also constituted an unlawful combination and conspiracy in violation of the Statutes of the United States, and more particularly the Act of Congress of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U. S. C. Title 15, §1) and the amendments thereof.

Twentieth: Upon information and belief the defendants are not and were not at the times herein mentioned, nor any of them, in the military or naval service of the United States or in the Militia called into or actually employed in the service of the United States. 253

Twenty-one: By reason of the premises, and the acts and conduct of the defendants and the Statutes of the United States in such case made and provided, the defendants are indebted to the Government of the United States in the sum of about $20,000,000. in which amount the Government of the United States sustained damages, and the defendants shall forfeit and pay to the United States the sum of $2,000. for each of said transactions and in addition, double the amount of damages sustained by the Government of the United States, and of which amount of damages and forfeitures the plaintiffs herein are entitled to receive one-half of such forfeitures and amount of damages which they shall recover and collect, and all costs the Court may award against the said defendants. 254

WHEREFORE, plaintiffs demand judgment against the defendants for the sum of double the amount of said damages aforesaid, to wit, $40,000,000., and in addition thereto the amount of forfeitures and penalties as ascertained and determined by this Court, which shall be at least in the sum of $2,000. together with the interest on said sums and the costs of this action. 255

EMANUEL THEBNER,
Attorney for Plaintiffs,
Office & P. O. Address,
111 John Street,
Borough of Manhattan,
City of New York.

Indictment.

IN THE
DISTRICT COURT OF THE UNITED STATES

256 FOR THE SOUTHERN DISTRICT OF NEW YORK

C 107-169

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, *ss.*:

INDICTMENT

The Grand Jurors of the United States of America being duly impanelled, sworn and charged in the District Court of the United States for the Southern District of New York, at the March Term of the said Court in the year 1940, and
257 inquiring for the said District, upon their oaths, find and present as follows, to wit:

COUNT ONE

DEFINITIONS

1. The term "military optical instruments" as used in this indictment shall be deemed to include such instruments as periscopes, range finders, altimeters, boresights, bomb sights, torpedo directors, sights for guns and other scientific optical instruments (except binoculars) used to direct and
258 control the firing of modern instruments and warfare. These instruments are an essential and integral part of what is commonly called the "fire control mechanism" of battleships, cruisers and submarines. They are likewise essential to the rapid and accurate firing of modern instruments and warfare.

PERIOD OF TIME COVERED BY THE INDICTMENT

2. The conspiracy and combination hereinafter alleged was entered into on or about April 28th, 1921, and continued thereafter up to and including the date of the presentation of this indictment. Each allegation hereinafter made in this indictment that an act has been done by any of the defendants herein, or any other person, shall be deemed to be an allegation that such act was performed within the three years next preceding the date of the presentation of this indictment, unless otherwise stated. 259

THE DEFENDANTS

3. The Bausch & Lomb Optical Company is hereby indicted and made a defendant herein. The said defendant, Bausch & Lomb Optical Company (hereinafter referred to as Bausch & Lomb) is a corporation organized under and existing by virtue of the laws of the State of New York, and has its principal place of business in Rochester, New York. For many years, the exact number to your Grand Jurors unknown, Bausch & Lomb has maintained and now maintains an office in the Borough of Manhattan, City of New York within this Southern District of New York, and has transacted business and now transacts business within the said district. Bausch & Lomb has been for many years, and is now, engaged in the business of manufacturing, among other things, military optical instruments at its plant in Rochester, New York, and distributing and selling the said military optical instruments in interstate and foreign commerce. 260 261

4. Carl Zeiss is hereby indicted and made a defendant herein. The said defendant, Carl Zeiss (hereinafter re-

ferred to as Zeiss) is a corporation or association existing under and by virtue of the laws of Germany, and has its
262 principal place of business in Jena, Germany. For many years, the exact number to your Grand Jurors unknown, Zeiss has been and is now engaged in the business of manufacturing, among other things, military optical instruments at its plant in Jena, Germany, and distributing and selling those instruments in Germany and in other countries in the world. For a number of years, including the three years next preceding the date of the return of this indictment, Zeiss has carried on business in the Borough of Manhattan, City of New York, and within the Southern District of New York, through the instrumentality and agency of
263 Carl Zeiss, Inc., a corporation organized on or about December 11th, 1925, and existing by virtue of the laws of the State of New York, which is a wholly owned subsidiary of Zeiss, and is completely dominated, controlled, and operated by Zeiss. Since 1921, Zeiss has carried on business in Holland and in other countries through the instrumentality and agency of N. V. Nederlandsche Instrumenten Compagnie (hereinafter referred to as Nedinsco), a corporation organized under and existing by virtue of the laws of Holland, which has its principal office at The Hague, Holland, and which is a wholly owned subsidiary of Zeiss, and is completely dominated and controlled by Zeiss. Through the instrumentality and agency of Nedinsco, Zeiss has carried
264 on the business of manufacturing military optical instruments at a plant in Holland, and distributing and selling the said instruments in various countries in the world.

5. Carl Zeiss, Inc., is hereby indicted and made a defendant herein. The said defendant, Carl Zeiss, Inc., as heretofore alleged, is a corporation organized and existing by virtue of the laws of the State of New York, and has main-

tained and now maintains its principal office in the Borough of Manhattan, City of New York, within this Southern District of New York, and has transacted business and now transacts business within the said district. 265

6. The following individuals are hereby indicted and made defendants herein, each being associated with Bausch & Lomb, and each having the official title or position therewith shown below. Said individual defendants, during a part of the period of time covered by this indictment, and during all of the three years next preceding the date of the return of the indictment, have held, and at the present time hold the official title or positions indicated below, and have been actively engaged in the management, direction, and control of the affairs and policies of Bausch & Lomb in and in connection with the interstate and foreign trade and commerce described in this indictment. 266

Name of Individual Defendants	*Address*	*Official Title or Position*
M. H. Eisenhart	Rochester, New York	President
Carl L. Bausch	Rochester, New York	Vice-President in charge of Research and Engineering
Theodore B. Drescher	Rochester, New York	Vice-President in charge of Operations

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7. Whenever it is hereinafter alleged in this indictment that the defendant Bausch & Lomb did do or perform any act or thing, the said allegation shall be deemed to mean that

each of the said individuals named herein as defendants and described as officers, agents or employees of Bausch & Lomb did authorize, order, direct and do such act or thing. Whenever it is hereinafter alleged in this indictment that the defendant Zeiss did do, or perform any act or thing, the said allegation shall be deemed to mean that the said act or thing was done by Zeiss, either in its own name, or through the instrumentality and agency of Nedinsco or Carl Zeiss, Inc.

268

NATURE OF THE INTERSTATE AND FOREIGN COMMERCE INVOLVED

8. Since 1921, Bausch & Lomb has manufactured, distributed and sold a substantial part of all optical instruments manufactured and distributed in the United States. In the five years next preceding the date of the return of this indictment, Bausch & Lomb has manufactured, distributed and sold approximately 50% of all military optical instruments manufactured, distributed and sold within the United States.

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9. For many years, including the three years next preceding the date of the return of this indictment, Zeiss and its subsidiary Nedinsco have been among the largest manufacturers and sellers of various types of optical instruments, including military optical instruments, in the world. For many years, including the three years next preceding the date of the return of this indictment, Zeiss and Nedinsco have manufactured and sold the greater part of all military optical instruments manufactured and sold in Europe.

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10. For many years prior to 1921, Bausch & Lomb and Zeiss competed with each other in countries other than the United States in the sale of all types of optical instruments,

including military optical instruments. Since 1921, Bausch & Lomb and Zeiss have not competed either in the United States or any other countries in the world in the sale and distribution of military optical instruments, although they have continued to compete in the sale and distribution of certain other types of optical instruments. Bausch & Lomb and Zeiss for many years have manufactured and distributed and now manufacture and distribute and sell in the aggregate the greater part of all military optical instruments manufactured and sold in the world. 271

11. Bausch & Lomb manufactures military optical instruments at its plant in Rochester, New York, for sale and shipment in interstate commerce principally to the United States Government and has, upon occasion, as hereinafter alleged, also sold military optical instruments to foreign governments, and to firms, shipyards and individuals located in the states of the United States other than the State of New York. The United States Government purchases such instruments for use on battleships, cruisers and submarines and for use with aircraft and artillery. Upon the receipt of an order from the United States Government, the said instruments are manufactured in Rochester, New York, and are shipped and transported in interstate commerce to the United States shipyards, forts and various military and naval units located in San Francisco, California; Boston, Massachusetts; Brooklyn, New York; Philadelphia, Pennsylvania; Washington, District of Columbia, and to various other states of the United States of America. 272 273

12. On a number of occasions between 1921 and the date of the return of this indictment, military optical instruments have been sold by Bausch & Lomb directly to Govern-

ments other than that of the United States of America. Bausch & Lomb manufactured the said instruments in
274 Rochester, New York, and shipped such instruments to the foreign country through the Port of New York, and such shipments constituted shipments in interstate and foreign commerce.

13. On a number of occasions between 1921 and the date of the return of this indictment, military optical instruments have been purchased from Bausch & Lomb by various firms, shipyards and individuals located in the United States of America. The instruments were used in the construction of battleships, cruisers and submarines intended for delivery to a foreign country. Bausch & Lomb manu-
275 factured the said instruments in Rochester, New York, and shipped such instruments to the various firms, shipyards, and individuals located in the United States of America, and such shipments constituted shipments in interstate commerce. Such instruments were intended for ultimate use in foreign commerce and were transported in foreign commerce.

14. At all times since 1921, including the three years next preceding the date of the return of this indictment, Bausch & Lomb and Zeiss have been engaged in importing military optical instruments into the United States through the Port
276 of New York in the said Southern District of New York. Zeiss has shipped the said military optical instruments from points in Europe to Bausch & Lomb through the Port of New York in the said Southern District of New York. Except for the said military optical instruments so shipped, neither Bausch & Lomb nor Zeiss has shipped to or imported into the United States any military optical instru-

ments which have been manufactured outside the United States.

THE COMBINATION AND CONSPIRACY 277

15. Beginning on or about April 28, 1921, defendants Bausch & Lomb and Zeiss, and since the date they became officers or directors of defendant Bausch & Lomb, defendants Eisenhart, Bausch and Drescher, and since on or about December 11th, 1925, the date of its incorporation, defendants Zeiss Inc., and continuing at all times thereafter up to and including the date of the presentation of this indictment, such defendants and other persons to your Grand Jurors unknown, well knowing all of the foregoing facts, have been engaged in a wrongful and unlawful combination 278 and conspiracy, carried on in part within the Southern District of New York, in restraint of the aforesaid interstate and foreign commerce in military optical instruments in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", that is to say:

16. The defendants, Bausch & Lomb and Zeiss, from on or about April 28th, 1921, to the date of the presentation of this indictment, and the defendants, Eisenhart, Bausch and Drescher, since the time they became officers or directors of the defendant, Bausch & Lomb, to the date of the 279 presentation of this indictment, and the defendant, Carl Zeiss Inc., from the date of its incorporation on or about December 11th, 1925 to the date of the presentation of this indictment, and other persons to the Grand Jurors unknown, have been continuously engaged during and throughout the periods of time aforesaid in an unlawful combination and

conspiracy to suppress and limit competition between themselves by agreeing (a) to divide the world market for mili-
280 tary optical instruments into certain geographical areas, the exclusive territory of Bausch & Lomb to be the United States of America, and the exclusive territory of Zeiss to be the rest of the world; (b) not to sell directly or indirectly such instruments for use in the area or territory allotted to the other without the prior consent of the other; (c) in the case of sales made by consent for use in the territory of the other, to fix, maintain, and control arbitrary, artificial, and unreasonable prices and terms of sale of such military optical instruments; (d) that Zeiss would not permit any person, firm or corporation which was engaged, or which wished to
281 engage in the United States in the business of manufacturing and distributing military optical instruments in competition with Bausch & Lomb, to use any of the devices, information, instruments, machinery, or equipment of Zeiss on any terms in connection with such manufacture and distribution even though such persons, firms, or corporations were ready, willing, and able to compensate Zeiss for the use of such knowledge, information, devices, instruments, machinery, and equipment, and (e) that Bausch & Lomb would not permit any person, firm or corporation which was engaged or which wished to engage outside the United States in the business of manufacturing and distributing military optical
282 instruments, to use any of the devices, information, instruments, machinery, or equipment of Bausch & Lomb on any terms in connection with such manufacture and distribution even though such persons, firms, or corporations were ready, willing, and able to compensate Bausch & Lomb for the use of such knowledge, information, devices, instruments, machinery, and equipment.

17. Said unlawful combination and conspiracy has been effectuated by divers means and methods, including among others, the following:

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(a) On or about April 28th, 1921, the corporate defendants entered into a written agreement in German for a period of twenty-one years, from May 1st, 1921, to April 30th, 1941. Paragraph 3 of such agreement as translated by defendant Bausch & Lomb, provides as follows:

> "B. & L. [Bausch & Lomb] obligate themselves not to sell, directly or indirectly, military instruments to countries outside of the United States of America, and vice versa Carl Zeiss obligate themselves not to sell such instruments, directly or indirectly to the United States unless the parties have come to an agreement regarding the conditions of sale and the respective territories of distribution."

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In Paragraph 9 of the said contract, Bausch & Lomb and Zeiss agreed to conceal the existence of the contract from third persons, and (so far as practicable) not to disclose the contract even to their own employees.

(b) In consideration of the obligations assumed by Zeiss in Paragraph 3 of the said agreement of April 28th, 1921, and certain other obligations assumed by Zeiss in the said agreement, Bausch & Lomb agreed in Paragraph 2 of the said agreement of April 28th, 1921, to pay to Zeiss for a period of twenty-five years from May 1st, 1921, a royalty equal to a percentage of the gross sales price of each military optical instrument sold by Bausch & Lomb, including each piece of such equipment sold by Bausch & Lomb to the Government of the United States, the said royalty to be

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paid irrespective of whether the piece of military optical equipment so sold was covered in whole or in part by
286 patents owned by Zeiss.

(c) The April 28th, 1921 agreement alleged in Paragraph 17(a) of this indictment, was supplemented on June 27th, 1925, and again on October 28th, 1925, to modify the provisions of Paragraph 2 with respect to royalty payments and to modify Paragraph 3 so as to specify the circumstances under which Bausch & Lomb and Zeiss could make quotations on military optical instruments, the eventual destination of which was the territory of the other, it being agreed that such a quotation could be made only with the consent of the other party to the agreement, and that the
287 price quoted should be agreed upon by Zeiss and Bausch & Lomb. Bausch & Lomb and Zeiss agreed that if either were requested to make bids by any government on military optical instruments intended for use in the territory allotted the other, the requested quotation would contain a mark-up over the bidders regular price up to 20% of said regular price, which excess was intended to throw the business to the party to whom the territory was allotted and, in case such bid were successful, the excess was to be paid by the successful bidder to the other contracting party.

(d) A new agreement, signed by Bausch & Lomb at
288 Rochester, New York, on November 26, 1926, and by Zeiss at Jena, Germany, on December 24th, 1926, was entered into by Bausch & Lomb and Zeiss. The said new agreement was identical with the agreement of April 28th, 1921 as supplemented, except that Paragraph 9 calling for secrecy was omitted from the new written agreement, Paragraph 2 was modified as to the royalty payments, and Paragraph 3

was changed so as not to indicate on its face that the parties to the contract had divided the world market between themselves and that each had agreed not to compete in the territory allotted to the other. Before the making of the said new agreement, Bausch & Lomb knew that Paragraph 3 of the contract of April 28th, 1921 as supplemented, violated the Anti Trust laws of the United States, and the said new agreement was made to conceal the existence of the agreement to divide the world market and not to compete in interstate and foreign commerce. Notwithstanding this change in the form of the April 28th, 1921 agreement as supplemented, Bausch & Lomb and Zeiss intended and continued to carry out the terms of Paragraphs 3 and 9 of the April 28th, 1921 agreement as supplemented in 1925. 289 290

(e) At all times after May 1st, 1921, to and including the three years next preceding the date of the return of this indictment, Bausch & Lomb has refused to sell or to quote prices on military optical instruments for use outside of the United States, until Zeiss has consented to such a sale. On a number of occasions since June 27th, 1925 Bausch & Lomb has sold military optical instruments for use outside of the United States only after first obtaining the consent of Zeiss as to the sale and the price and in the case of each such sale the sale was made at an arbitrary, artificial, unreasonable and non-competitive price agreed upon by Zeiss and Bausch & Lomb. On other occasions subsequent to May, 1921, Bausch & Lomb has offered to sell military optical instruments for use outside of the United States, with the consent of Zeiss, at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by Zeiss and Bausch & Lomb. At all times subsequent to May, 1921, to and including the three years next preceding the date of the return 291

of this indictment, Bausch & Lomb has refused to permit persons, firms and corporations who were engaged or who
292 wished to engage in the production and distribution of military optical equipment outside of the United States, to use any of the devices, information, machinery, or equipment of Bausch & Lomb for such production and distribution, even though such persons, firms or corporations were ready, willing and able to compensate Bausch & Lomb for such use.

(f) At all times subsequent to May 1st, 1921, to and including the three years next preceding the date of the return of this indictment, Zeiss has refused to sell military optical instruments for use within the United States unless the sales were consented to by Bausch & Lomb. On various
293 occasions, subsequent to June 27th, 1925, Zeiss has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by Bausch & Lomb and Zeiss. At all times subsequent to May 1st, 1921, to and including the three years next preceding the date of the return of this indictment, Zeiss has refused to permit any person, firm or corporation engaged in, or who wished to engage in the manufacture and distribution of military optical instruments in the United States in competition with Bausch & Lomb, to use any of the devices, knowledge, instruments and equipment of Zeiss for the pro-
294 duction of military optical instruments even though such persons, firms and corporations were ready, willing and able to compensate Zeiss for such use.

(g) Since May 1st, 1921, to and including the three years next preceding the date of the return of this indictment, Bausch & Lomb, pursuant to and in execution of the combination and conspiracy described in this indictment, has paid to

Zeiss (pursuant to the provisions of Paragraph 2 of the said agreement of April 28th, 1921, as supplemented and modified, as described in Paragraph 17(c) and (d) of this indictment), as a royalty, a percentage on the gross sales price of each piece of military optical equipment sold by Bausch & Lomb, including each piece of such equipment sold by Bausch & Lomb to the Government of the United States, and each such payment has been made irrespective of whether the piece of miliary optical equipment with respect to which the payment was made, has been covered in whole or in part by patents owned by Zeiss. 295

(h) At all times subsequent to on or about December 11th, 1925, to and including the three years next preceding the date of the return of this indictment, Carl Zeiss, Inc. has refused to sell military optical instruments for use in the United States. 296

EFFECTS OF THE COMBINATION AND CONSPIRACY

18. By carrying out the combination and conspiracy hereinbefore described, the defendants have directly, substantially and unreasonably restrained interstate and foreign commerce in military optical instruments; have exacted arbitrary, artificial, unreasonable and non-competitive prices from purchasers of military optical instruments including the Government of the United States, and have prevented and restrained free and vigorous competition in the production and distribution of military optical instruments in the United States and in the interstate and foreign commerce. 297

JURISDICTION AND VENUE

19. The combination and conspiracy hereinbefore alleged, has operated and has been carried out, in part, within the

Southern District of New York. The defendants, within three years preceding the date of the return of this indictment, in effectuating and carrying on said combination and conspiracy, have, within said district, performed, among others, the following acts:

298

(a) Bausch & Lomb refused in said district to sell military optical instruments to prospective purchasers if such instruments were eventually to go outside of the United States of America.

(b) Bausch & Lomb refused in the said district to enter into arrangements whereby the information, knowledge, equipment and machinery of Bausch & Lomb would be sold or employed in the production of military optical instruments intended for use outside the United States.

299

(c) Zeiss has shipped and Bausch & Lomb has received military optical instruments, through the Port of New York, in the Southern District of New York, which instruments were thereafter sold by Bausch & Lomb to the Government of the United States at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by the defendants.

(d) Zeiss has collected and received from Bausch & Lomb in the said Southern District of New York, the said royalty payments paid by Bausch & Lomb to Zeiss pursuant to the said contract of April 28th, 1921 as supplemented and modified by the agreements referred to in Paragraph 17(c) and (d) in this indictment.

300

(e) Carl Zeiss, Inc. has refused in the said Southern District of New York to sell military optical instruments to prospective purchasers for use within the United States.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that the defendants, including the corporate defendants, throughout the period aforesaid, including the three years next preceding the date of the return of this indictment, at the places and in the manner and form aforesaid, unlawfully have engaged in a continuing combination and conspiracy in restraint of trade and commerce in military optical instruments among the several states of the United States of America, and with foreign nations, contrary to the form of the statute of the United States of America in such case made and provided and against the peace and dignity of the United States of America. 301

COUNT TWO 302

And the Grand Jurors aforesaid, inquiring as aforesaid, upon their oaths aforesaid, do hereby reaffirm, reallege, and incorporate as if herein set forth in full, each of the allegations set forth in Paragraphs 1 to 4, inclusive, and 6 to 14, inclusive, of Count One of this indictment.

THE COMBINATION AND CONSPIRACY

20. Beginning on or about April 28th, 1921, defendants Bausch & Lomb and Zeiss, and since the date they became officers or directors of defendants, Bausch & Lomb, defendants Eisenhart, Bausch and Drescher, and continuously thereafter up to and including the date of the presentation of this indictment, such defendants, well knowing all the facts heretofore alleged in this indictment, have been engaged in an unlawful combination, conspiracy and contract carried on in part within the Southern District of New York in restraint of interstate and foreign commerce in military 303

optical instruments. In so doing the defendants have then and there engaged in an unlawful combination, conspiracy,
304 and agreement intended to operate in restraint of lawful trade and free competition in the United States in imported military optical instruments and intended to increase the market price in the United States of America of said imported military optical instruments, all in violation of §73 of the Act of August 27, 1894, entitled "An Act to amend Section seventy-three and Section seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' ", that is to say

305 21. The defendants, Bausch & Lomb and Zeiss, from on or about April 28th, 1921, to the date of the presentation of this indictment, and the defendants Eisenhart, Bausch and Drescher, since the time they became officers or directors of the defendant, Bausch & Lomb to the date of the presentation of this indictment, and other persons to the Grand Jurors unknown, have been continuously engaged during and throughout the periods of time aforesaid, in an unlawful combination and conspiracy to suppress and limit competition between themselves by agreeing (a) to divide the world market for military optical instruments into certain geographical areas, the exclusive territory of Bausch & Lomb to the United States of America, and the exclusive territory
306 of Zeiss to be the rest of the world; and (b) not to sell directly or indirectly such instruments for use in the area or territory allotted to the other without the prior consent of the other; (c) in the case of sales made by consent for use in the territory of the other, to fix, maintain, and control arbitrary, artificial and unreasonable prices, and terms of sale on such military optical instruments; (d) and that

defendant Zeiss would not sell any military optical instruments or any parts thereof, or any machinery capable of being used for the manufacture of military optical instruments to any person, firm or corporation in the United States which was engaged or which wished to engage in the United States in the business of manufacturing and distributing military optical instruments. 307

22. Said unlawful combination and conspiracy has been effectuated by divers means and methods including, among others the following:

(a) On or about April 28th, 1921, Bausch & Lomb and Zeiss entered into a written agreement in German for a period of twenty-one years, from May 1st, 1921 to April 30th, 1941. Paragraph 3 of such agreement as translated by defendant Bausch & Lomb, provides as follows: 308

> "B. & L. [Bausch & Lomb] obligate themselves not to sell, directly or indirectly, military instruments to countries outside of the United States of America, and vice versa Carl Zeiss obligate themselves not to sell such instruments, directly or indirectly to the United States unless the parties have come to an agreement regarding the conditions of sale and the respective territories of distribution."

309

In Paragraph 9 of the said contract Bausch & Lomb and Zeiss agreed to conceal the existence of the contract from third persons and (so far as practicable) not to disclose the contract even to their own employees.

(b) In consideration of the obligations assumed by Zeiss in Paragraph 3 of the said agreement of April 28th, 1921

and certain other obligations assumed by Zeiss in the said agreement, Bausch & Lomb agreed in Paragraph 2 of the said
310 agreement of April 28th, 1921, to pay to Zeiss for a period of twenty-five years a royalty equal to a percentage of the gross sales price of each military optical instruments sold by Bausch & Lomb, including each piece of such equipment sold by Bausch & Lomb to the Government of the United States, the said royalty to be paid irrespective of whether the piece of military optical equipment so sold was covered in whole or in part by patents owned by Zeiss.

(c) The April 28th, 1921 agreement alleged in Paragraph 22(a) of this indictment was supplemented on June 27th,
311 1925 and again on October 28th, 1925, to modify the provisions of Paragraph 2 with respect to royalty payments and to modify Paragraph 3 so as to specify the circumstances under which Bausch & Lomb and Zeiss could make quotations on military optical instruments, the eventual destination of which was the territory of the other, it being agreed that such a quotation could be made only with the consent of the other party to the agreement, and that the price quoted should be agreed upon by Zeiss and Bausch & Lomb. Bausch & Lomb and Zeiss agreed that if either were requested to make bids by any government on military optical instruments intended for use in the territory allotted the other, the requested quotation would contain a markup over the bidders
312 regular price up to 20% of said regular price, which excess was intended to throw the business to the party to whom the territory was allotted and, in case such bid were successful, the excess was to be paid by the successful bidder to the other contracting party.

(d) A new agreement, signed by Bausch & Lomb at Rochester, New York, on November 26th, 1926, and by Zeiss

at Jena, Germany, on December 24th, 1926 was entered into by Bausch & Lomb and Zeiss. The said new agreement was identical with the agreement of April 28th, 1921, as supplemented, except that Paragraph 9 calling for secrecy was omitted from the new written agreement, Paragraph 2 was modified as to royalty payments and Paragraph 3 was changed so as not to indicate on its face that the parties to the contract had divided the world market between themselves and that each had agreed not to compete in the territory allotted to the other. Before the making of the said new agreement, Bausch & Lomb knew that Paragraph 3 of the contract of April 28th, 1921, as supplemented, violated the Anti-Trust laws of the United States, and the said new agreement was made to conceal the existence of the agreement to divide the world market and not to compete in interstate and foreign commerce. Notwithstanding this change in the form of the April 28th, 1921 agreement as supplemented, Bausch & Lomb and Zeiss intended and continued to carry out the terms of Paragraphs 3 and 9 of the original April 28th, 1921 agreement as supplemented in 1925. 313 314

(e) At all times after May 1st, 1921 to and including the three years next preceding the date of the return of this indictment Bausch & Lomb has refused to sell or to quote prices on military optical instruments for use outside of the United States, unless Zeiss has consented to such a sale. On a number of occasions since June 27th, 1925, Bausch & Lomb has sold military optical instruments for use outside of the United States only after first obtaining the consent of Zeiss as to the sale and the price and in the case of each such sale the sale was made at an arbitrary, artificial, unreasonable and non-competitive price agreed upon by Zeiss and Bausch & Lomb. On other occasions subsequent to May, 1921, 315

Bausch & Lomb has offered to sell military optical instruments for use outside of the United States, with the consent
316 of Zeiss, at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by Zeiss and Bausch & Lomb. At all times subsequent to May, 1921, and including the three years next preceding the date of the return of this indictment, Bausch & Lomb has refused to permit persons, firms and corporations who were engaged or who wished to engage in the production and distribution of military optical equipment outside of the United States, to use any of the devices, information, machinery, or equipment of Bausch & Lomb for such production and distribution, even though such persons, firms or corporations were ready, willing
317 and able to compensate Bausch & Lomb for such use.

(f) At all times subsequent to May 1st, 1921, to and including the three years next preceding the date of the return of this indictment, Zeiss has refused to sell military optical instruments for use within the United States unless the sales were consented to by Bausch & Lomb. On various occasions subsequent to June 27th, 1925, Zeiss has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by Bausch & Lomb and Zeiss. At all times subsequent to May 1st, 1921, including the three years next preceding
318 the date of the return of this indictment, Zeiss has refused to permit any person, firm or corporation engaged in, or who wished to engage in the manufacture and distribution of military optical instruments in the United States in competition with Bausch & Lomb, to use any of the devices, knowledge, instruments and equipment of Zeiss for the production of military optical instruments even though

such persons, firms and corporations were ready, willing and able to compensate Zeiss for such use.

(g) Since May 1st, 1921, and including the three years next preceding the date of the return of this indictment, Bausch & Lomb, pursuant to and in execution of the combination and conspiracy described in this indictment, has paid to Zeiss (pursuant to the provisions of Paragraph 2 of the said agreement of April 28th, 1921, as supplemented and modified, as described in Paragraph 22(c) and (d) of this indictment) as a royalty, a percentage on the gross sales price of each piece of military optical equipment sold by Bausch & Lomb, including each piece of such equipment sold by Bausch & Lomb to the Government of the United States, and each such payment has been made irrespective of whether the piece of military optical equipment with respect to which the payment was made, has been covered in whole or in part by patents originating with Zeiss. 319 320

EFFECTS OF THE COMBINATION AND CONSPIRACY

23. By carrying out the combination and conspiracy hereinbefore described, the defendants have directly, substantially and unreasonably restrained lawful trade and free competition in imported military optical instrument; have exacted arbitrary, artificial, unreasonable, excessive and noncompetitive prices from purchasers of imported military optical instruments, including the Government of the United States, and have prevented and restrained free and vigorous competition in the production and distribution of imported military optical instruments in the United States and in interstate and foreign commerce. 321

JURISDICTION AND VENUE

24. The combination and conspiracy hereinbefore alleged,
322 has operated and has been carried out, in part, within the Southern District of New York. The defendants, within three years preceding the date of the return of this indictment, in effectuating and carrying on said combination and conspiracy, have, within said district, performed, among others, the following acts:

(a) Zeiss has shipped from Europe and Bausch & Lomb has received military optical instruments, through the Port of New York, in the Southern District of New York, which imported instruments were thereafter sold by Bausch &
323 Lomb to the Government of the United States at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by the defendants.

(b) Zeiss has collected and received from Bausch & Lomb in the said Southern District of New York, the said royalty payments paid by Bausch & Lomb to Zeiss pursuant to the said contract of April 28th, 1921 as supplemented and modified by the agreements referred to in Paragraph 22(c) and (d) in this indictment.

And so the Grand Jurors aforesaid, upon their oaths
324 aforesaid, do find and present that the defendants, including the corporate defendants, throughout the period aforesaid, including the three years next preceding the date of the return of this indictment, at the places and in the manner and form aforesaid, unlawfully have engaged in a continuing combination and conspiracy intended to operate in restraint of lawful trade and free competition in imported military optical instruments among the several states of

the United States of America, and with foreign nations, and intended to increase the price of imported military optical instruments, contrary to the form of the statute of the United States of America, in such case made and provided, and against the peace and dignity of the United States of America.

Samuel S. Isseks (Sgd)
SAMUEL S. ISSEKS,
Special Assistant to the
Attorney General.

Monroe Karasik (Sgd)
MONROE KARASIK

Marcus A. Hollabaugh (Sgd)
MARCUS A. HOLLABAUGH

Stanley E. Disney (Sgd)
STANLEY E. DISNEY

Irving B. Glickfeld (Sgd)
IRVING B. GLICKFELD
Special Attorneys.

Attorneys for the United States of America

A true bill

GEORGE E. SEALY
Foreman

May 27, 1940

The Bausch & Lomb Optical Co. pleading

328 Nollo Contendre

by M. H. Eisenhart

M. H. Eisenhart ..... Nollo contendre plea entered

Carl L. Bausch ..... " "

Theodore B. Drescher ..... " "

Carl Zeiss Inc. adjd. to 6/24

Each of Defts. The Bausch & Lomb Optical Co.
M. H. Eisenhart, Carl L. Bausch and
329 Theodore B. Drescher

Fined $5,000. on each of counts 1 & 2

GODDARD, *J.*

Bail discharged as to M. H. Eisenhart,
Carl L. Bausch & Theodore B. Drescher
on consent of Spec. Asst. to Atty. General

GODDARD, *J.*

Mar 5—1941

Carl Zeiss Inc.—Pleads nollo contendre
by A. L. Love Jr., V. P. & Sec.

330

Fined $1,000.

G., *J.*

March 29, 1940

The Bausch & Lomb Optical Co.
Pleads not guilty

by Whitney W. Seymour,
Atty of firm of Simpson, Thacher & Bartlett

Indictment.

Carl Zeiss, Inc. Pleads not guilty
by C. L. Hays, Atty

M. H. Eisenhart Pleads not guilty 331
Bail $1000.) Paroled
Carl L. Bausch " ") to give bail
Pleads not guilty

Deft. Eisenhart and Bausch
allowed to depart the jurisdiction
of this Court — —

Order to be entered.

Twenty days for motions.

332

MANDELBAUM, *J.* J. G.

Apr. 16, 1940

Theodore B. Drescher Pleads not guilty
Bail $1000

Paroled to give bail

CONGER, *J.*
J. G.

333

BAUSCH & LOMB BILL OF PARTICULARS.

IN THE
DISTRICT COURT OF THE UNITED STATES
334
FOR THE SOUTHERN DISTRICT OF NEW YORK

C 107–169

UNITED STATES OF AMERICA,

Plaintiff,

—*v.*—

BAUSCH & LOMB OPTICAL COMPANY, *et al.*,

Defendants.

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The United States of America, by Samuel S. Isseks, Special Assistant to the Attorney General of the United States, its attorney, voluntarily submits the following bill of particulars, on information and belief in answer to the demands of the defendants, Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch, and Theodore B. Drescher, embodied in the motion dated April 16, 1940, for a bill of particulars served upon the Government on the 17th day of April, 1940.

The numbering herein follows the numbering in the defendants' motion papers.
336

1. & 2. The conspiracy and combination entered into on or about April 28, 1921, as alleged in paragraphs 2, 15, 16, 20 and 21 of the indictment, was on or about that date entered into by defendant, Bausch & Lomb Optical Company (hereinafter referred to as Bausch & Lomb), its then vice president, George N. Saegmuller (now deceased), and Carl

Zeiss of Jena, Germany (hereinafter referred to as Zeiss) and its officers, Dr. Ing. Bauersfeld, and another named "Kotthaus".

337 The conspiracy and combination was in writing, and photostatic copies of a written agreement in German between Bausch & Lomb and Zeiss and an English translation of such agreement made for and by the defendant, Bausch & Lomb, both produced by the defendant Bausch & Lomb before the Grand Jury in compliance with a subpoena duces tecum served upon it, are annexed hereto and marked, respectively, Exhibits A and B.

In addition to the express terms of the agreement as set forth in Exhibits A and B to this bill of particulars, it was agreed between defendants Bausch & Lomb and Zeiss, and 338 the other individuals referred to who entered into the combination and conspiracy, that in the case of sales made by Bausch & Lomb or Zeiss for use in the territory exclusively assigned to the other, Bausch & Lomb and Zeiss would together fix, maintain and control arbitrary, artificial and unreasonable prices and terms of sale of military optical instruments; that Zeiss would not permit any person, firm or corporation which was engaged or which wished to engage in the United States in the business of manufacturing and distributing military optical instruments in competition with Bausch & Lomb, to use any of the devices, information, instruments, machinery or equipment of Zeiss on any terms in 339 connection with such manufacture and distribution, even though such persons, firms or corporations were ready, willing and able to compensate Zeiss for the use of such knowledge, information, devices, instruments, machinery and equipment; and similarly that Bausch & Lomb would not permit any person, firm or corporation which was engaged or which wished to engage outside the United States in the

business of manufacturing and distributing military optical instruments to use any of the devices, information, instru-
340 ments, machinery or equipment of Bausch & Lomb on any terms in connection with such manufacture and distribution, even though such persons, firms or corporations were ready, willing and able to compensate Bausch & Lomb for the use of such knowledge, information, devices, machinery and equipment.

The details and circumstances with regard to the entering of this conspiracy and combination are as follows:

Prior to April 28, 1921, a representative of Zeiss conferred in Rochester with officers, directors, and employees of Bausch
341 & Lomb, including Edward Bausch, then president of Bausch & Lomb and now chairman of its Board of Directors, Carl F. Lomb (now deceased), William A. E. Drescher (now deceased), and George N. Saegmuller (now deceased). As a result of negotiations in Rochester, said George N. Saegmuller, vice president, was designated and given full power of attorney by the directors of Bausch & Lomb to go to Germany, and negotiate an agreement with Zeiss relating to military optical instruments and the division of territory in respect thereof. Said George N. Saegmuller, with his son, Frederick B. Saegmuller, then an employee of Bausch & Lomb, went to Germany, and there negotiated the terms of
342 the agreement hereinabove referred to in this bill of particulars. Said agreement provided that a separate Military Department of Bausch & Lomb would be created under the guidance of Zeiss. Said Oswald H. Wolferts then left the employ of Zeiss (with the consent of Zeiss) to become employed in the newly created Military Department of Bausch & Lomb. On October 3, 1921 a committee consisting of Edward Bausch, defendant M. Herbert Eisenhart, said Fred-

erick B. Saegmuller, and Dr. O. Eppenstein, representing Zeiss, executed a memorandum in Rochester for the creation by Bausch & Lomb of a new Military Department with said Frederick B. Saegmuller at its head and said Oswald H. Wolferts as his assistant. By the terms of this memorandum, the Military Department was to report to the Executive Committee of Bausch & Lomb through Defendant M. Herbert Eisenhart, said Frederick B. Saegmuller, and Joseph F. Taylor of Bausch & Lomb. 343

3. Military optical instruments sold by Bausch & Lomb to foreign governments and to firms, ship yards, and individuals located in States of the United States other than the State of New York, as alleged in paragraph 11 of the indictment, were sold to the following: (Such instances are presently known to the Government based on documents produced by Bausch & Lomb before a grand jury pursuant to a subpoena duces tecum. There may be other instances shown by other records of defendant Bausch & Lomb, and the Government reserves the right to prove such other instances from such other records). 344

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Bausch & Lomb Bill of Particulars.

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(a) *When and Where Sold*	(c) *Name of Vendee and Price*	(b) *Description of Inst.*
(i) On or about 9/8/27	Bloomfield, New Jersey	1 m. Range Finder $750.	Geo-Physical Laboratory
(ii) On or about 3/7/27	Chicago, Illinois	1 m. Range Finder $640.	Almer Coe & Co.
(iii) On or about 8/15/24	Fore River, Mass.	4 Mark xi telescopes $242. each	Bethlehem Ship Building Corp.
(iv) On or about 8/15/24	Fore River, Mass.	4 Mark xi telescopes with checking eye-piece $352. each	Bethlehem Ship Building Corp.
(v) On or about 8/15/24	Fore River, Mass.	Mark vi telescopes $533. each	Bethlehem Ship Building Corp.
(vi) On or about 8/15/24	Fore River, Mass.	4 24 ft. erect Coincidence Range Finders each $99.	Bethlehem Ship Building Corp.
(vii) On or about 8/15/24	Fore River, Mass.	1 Mark xi telescope, Model 6 $242.	Bethlehem Ship Building Corp.
(viii) On or about 8/15/24	Fore River, Mass.	1 Mark xi telescope, Model 5 $352.	Bethlehem Ship Building Corp.
(ix) On or about 8/15/24	Fore River, Mass.	1 Mark iii telescope $540.	Bethlehem Ship Building Corp.
(x) On or about	Fore River,	4 Mark xi Model- $242.	Bethlehem Ship

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Bausch & Lomb Bill of Particulars.

4. Military optical instruments sold by Bausch & Lomb direct to Governments other than that of the United States, as alleged in paragraph 12 of the indictment, are as follows: (Such instances are presently known to the Government based on documents of Bausch & Lomb produced before a grand jury pursuant to a subpoena duces tecum. There may be other instances shown by other records of Bausch & Lomb and the Government reserves the right to prove such other instances from such other records.)

(a) *When and Where Sold*		(b) *Description of Inst. and Price*		(c) *Name of Vendee*
(i) On or about 4/5/28	Rochester, New York	10–15 bore sights	$205. each	Brazilian Government
(ii) On or about 10/22/29	Washington, D. C.	12" gun sight telescopes	$385. each	Brazilian Government

5. (a), (b), and (d). Military optical instruments purchased from Baush & Lomb by various firms, ship yards and individuals located in the United States of America, as alleged in paragraph 13 of the indictment are those set forth under items (iii) to (x) in paragraph 3 hereof, except that as stated in paragraph 3 hereof, there may be other instances not shown by records produced by Bausch & Lomb before the grand jury pursuant to a subpoena duces tecum, and the Government reserves the right to prove such other instances from other records of Bausch & Lomb.

(c) The instruments used in the construction of battle ships, cruisers and submarines intended for delivery to a foreign country, as alleged in paragraph 13 of the indictment, formed parts of fire control apparatus of the battle ships

"Rivadavia" and "Moreno", and were intended for delivery to the Republic of Argentina.

352 6. Military optical instruments imported into the United States through the Port of New York by Bausch & Lomb and Zeiss, presently known to the Government are set forth below. These instances have been disclosed by the records of Bausch & Lomb produced before the grand jury pursuant to a subpoena duces tecum. Many other instances may be shown by other records of Bausch & Lomb presently in its possession, and the Government reserves the right to prove such other instances from such records:

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(a) *When Military Optical Instruments were imported into the United States*	(b) *What Instruments were so Imported and the Prices thereof.*	(c) *Points to and from which such Shipments were Allegedly made.*
(i) On or about 6/1/30	1 stereo 4 m. Range Finder type disaltimus i, $7,360.	From Venlo/Rotterdam, Holland to New York City.
(ii) On or about 6/1/30	1 stereo 4 m. Range Finder, $6,030.	From Venlo/Rotterdam, Holland to New York City.
(iii) On or about 12/15/30	Machine frames, total price approximately $3,465.65.	From Bremen, Germany to New York City
(iv) On or about 8/15/30	6 combine stedimeter and course detector attachments, price unknown.	From Venlo/Rotterdam, Holland to New York City.
(v) On or about 11/7/33	Altimeter periscopes and accessories, approximately $20,634.80	From Venlo/Rotterdam, Holland to Navy Yard, Brooklyn, New York.
(vi) On or about 9/26/33	2 altimeter periscopes and accessories, total price of approximately $15,280.50	From Venlo/Rotterdam, Holland to Navy Yard, Brooklyn, New York.
(vii) On or about 9/15/38	1 8-meter stereo-telemeter, price to United States Government, approximately $24,460	From Venlo/Rotterdam, Holland, to New York.

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7, 10. The dates since when it is claimed that the defendants Eisenhart, Bausch and Drescher have been engaged in
358 the combination and conspiracy as alleged in paragraphs 15 and 16, and 20 and 21, of the indictment are as follows:

Defendant Eisenhart has been engaged in the combination and conspiracy since no later than October 3, 1921, when he executed the memorandum referred to in paragraphs 1 and 2 of this bill of particulars.

Defendant Carl L. Bausch has been engaged in the combination and conspiracy since no later than October 1927, when he succeeded said Frederick B. Saegmuller as the person in charge of Bausch & Lomb's Military Department.

359 Defendant Drescher has been engaged in the combination and conspiracy since some time in 1922, when he became a director of Bausch & Lomb.

8, 9. The defendants Eisenhart, Bausch and Drescher entered into the agreement referred to in paragraphs 16 and 21 of the indictment as follows:

Defendant Eisenhart, in Rochester, not later than October 3, 1921, when he executed the memorandum referred to in paragraphs 1 and 2 of this bill of particulars.

Defendant Bausch, in Rochester, not later than October 1927, when said Bausch became the head of the
360 Military Department of Bausch & Lomb.

Defendant Drescher, in Rochester, when he became a director of Bausch & Lomb, in 1922.

Defendants Eisenhart, Bausch and Drescher each joined the conspiracy theretofore entered into on or about April 28, 1921 by Bausch & Lomb and Zeiss and the individuals referred to in paragraphs 1 and 2 of this bill of particulars, and the nature and substance of the agreement which they entered into are set forth in paragraphs 1 and 2 of this bill of particulars.

11. (a) A photostatic copy of the German agreement

alleged in paragraph 17 (a) and (b) and paragraph 22 (a) and (b) of the indictment, and a photostatic copy of a translation of such agreement as made for and by Bausch & Lomb 361
are attached hereto and marked Exhibits A and B, respectively.

(b) Such agreement was entered into on or about April 28, 1921 in Jena, Germany, and George N. Saegmuller (now deceased) acted on behalf of Bausch & Lomb.

12. (a) Copies of the agreements alleged in paragraph 17 (c) and paragraph 22 (c) of the indictment, as translated in English by and for Bausch & Lomb, are annexed hereto and marked Exhibits C and D, respectively.

(b) The agreement of June 27, 1925 as alleged in para- 362
graphs 17 (c) and 22 (c) of the indictment was executed on behalf of Bausch & Lomb at Rochester by Carl F. Lomb (now deceased).

The agreement of October 28, 1925, as alleged in paragraphs 17 (c) and 22 (c), was executed by Bausch & Lomb in Rochester on December 11, 1925 by said Carl F. Lomb.

13. (a) A photostatic copy of the German agreement alleged in paragraphs 17 (d) and 22 (d), and a translation of such agreement made for and by Bausch & Lomb are annexed hereto and marked Exhibits E and F, respectively.

(b) Such agreement was executed on behalf of Bausch 363
& Lomb by Carl F. Lomb (now deceased).

14. Bausch & Lomb has refused to sell or to quote prices on military optical instruments for use outside the United States unless Zeiss consented to such sales, as alleged in paragraphs 17 (e) and 22 (e) of the indictment in the following instances: (Such instances are presently known to the Government based on documents of Bausch & Lomb produced before a grand jury pursuant to a subpoena duces tecum. There may be other instances based on other records of Bausch & Lomb, and the Government reserves the right to prove such other instances.)

	(a)		(b)	(c)
	When	*Where*	*Instruments*	*Name of Prospective Buyer*
i	On or about February 26, 1940	New York City	Height Finders	American Ordnance Corp.
				Hoepli & Co.
ii	On or about December 12, 1939	New York City	2 and 4 meter Range Finders	
iii	On or about November 6, 1939	New York City	3 Range Finders	Aviation Equipment & Export Co.
iv	On or about August 23, 1939	Washington,	1) 10 Anti-Aircraft Height and Range Finders, 4 meter base 2) 22 Marine Range Finders, 4 meter base	Ministry of Defense, Finland

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v	On or about January 6, 1939	New York City	1) 8 Goniometers graduated in mills 2) 2 Squares 3) 2 Telescopes for battery commanders 4) 4 Prismatic compasses 5) 2 Field glasses 6) 2 Telemeters, one meter base 7) 2 Telescopic, indexed quadrants 8) 2 Circumferentors with tripods 9) 2 Modern Telephone Communicating Systems	Frank Sheridan Jonas
vi	On or about October 13, 1938	Irvine, Pa.	Range Finders	National Forge & Ordnance Co.

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	(a) *When*	*Where*	(b) *Instruments*	(c) *Name of Prospective Buyer*
vii	On or about May 13, 1938	Irvine, Pa.	18 Panoramic telescopes	National Forge & Ordnance Co.
viii	On or about April 1, 1938	Rahway, N. J.	4 meter and 6 meter Range Finders	American Armament Corp.
ix	On or about March 30, 1938	Washington, D. C.	4 meter Stereo Height Finders	British Embassy
x	On or about September 13, 1937	Cleveland, Ohio	1 meter Range Finder	Eastman Kodak Stores, Inc.
xi	On or about June 8, 1937	East Hartford, Conn.	Airplane Machine Gun Sighting Devices	United Aircraft Exports Corp.
xii	On or	Hoboken, N. J.	1) 6/8 meter Army	American Armament Corp.

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xii	On or about August 17, 1936	Hoboken, N. J.	1) 6/8 meter Army Range Finders 2) 12/14 meter Navy Range Finders	American Armament Corp.
xiii	On or about August 7, 1936	New York City	Stereo Range and Height Finders	Carp Export & Import Corp.
xiv	On or about June 19, 1936	New York City	Stereo Range Finders	Morris Wolf
xv	On or about February 6, 1936	Irvine, Pa.	Anti-Aircraft Telescopes	National Forge & Ordnance Co.
xvi	On or about February 6, 1936	Rio de Janeiro, Brazil	Telemeters	Military Aviation School
xvii	On or about June 12, 1934	New York City	Range Finders	Kenneth M. Hill

	(a)		(b)	(c)
	When	*Where*	*Instruments*	*Name of Prospective Buyer*
xviii	On or about May 25, 1934	New York City	4 Telemeters	Ernest A. Abadie
xix	On or about April 4, 1934	New York City	Military Fire Control Instruments	Lucke Kiffe Company
xx	On or about April 3, 1934	Athens, Greece	Height Finder Stereo Spotting Telescopes	Spiridon Tzimopoulos
xxi	On or about April 2, 1934	Paris, France	8 meter Periscope	Mathis & Cie.
xxii	On or about December 1, 1933	Bangkok, Siam	Height Finders and Range Finders	Suphan Phanich Co., Ltd.
xxiii	On or	Shanghai,	1) Fire Control	George Hung & Company

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xxiii	On or about April 13, 1933	Shanghai, China	1) Fire Control Equipment for 37 milimeter Anti-Aircraft Gun 2) Fire Control Equipment for 3 inch Anti-Aircraft Gun	George Hung & Company
xxiv	On or about October 31, 1932	Mexico City, Mexico	1 meter Naval Coincidence Range Finder	Mario Padilla
xxv	On or about October 26, 1932	Schenectady, New York	1 meter Naval Coincidence Range Finders and Mounts	International General Electric Co., Inc.
xxvi	On or about April 21, 1932	Stockholm, Sweden	1) Telemeters 2) Military and Naval Range Finders	Aktiebolaget Ernst Aug.Jürke
xxvii	On or about March 8, 1932	Washington, D. C.	1) Height Finders 2) Range Finders 3) Observer Telescopes	Spanish Embassy

	(a)		(b)	(c)
	When	*Where*	*Instruments*	*Name of Prospective Buyer*
xxviii	On or about January 21, 1932	Pittsburgh, Pa.	Artillery Spotter	Federal Laboratories, Inc.
xxix	On or about October 30, 1931	Hamburg, Germany	Bomb Sights	Simon, Evers & Co. G.m.b.H.
xxx	On or about July 13, 1931	Washington, D. C.	8 Height Finders	Department of Commerce for Greek Government
xxxi	On or about December 27, 1930	New York City	3 meter Stereo Range and Height Finders	Interflash Signal Corp.
xxxii	On or about July 17, 1930	Canton, Ohio	Range Finder	The Berger Manufacturing Company

xxxiii	On or about April 22, 1930	New York City	Two hundred 1-1/4 meter Invert Range Finders	Amtorg Trading Corporation
xxxiv	On or about July 25, 1929	Marcinelle, Belgium	20/25 cm. Range Finder	Leopold Gabriel
xxxv	On or about April 24, 1929	New York City	Range Finders for Optical Fire Control Instruments	Lieutenant T. W. Biggs, Chilean Naval Attache
xxxvi	On or about August 29, 1928	Athens, Greece	3 Telemeters, 12/15 feet	Grote & Company
xxxvii	On or about November 27, 1927	Buenos Aires, Argentina	Director Telescopes	Ministry of Marine

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	(a)		(b)	(c)
	When	*Where*	*Instruments*	*Name of Prospective Buyer*
xxxviii	On or about September 20, 1927	New York City	One 1-1/2 meter Range Finder	Asano Bussam Co. Ltd.
xxxix	On or about March 19, 1927	New York City	1) One Range Finder 2) One Direction Finder	Suzuki & Co. Ltd.
xl	On or about January 14, 1927	New London, Conn.	Submarine Periscopes	Electric Boat Company
xli	On or about December 23, 1926	New York City	Sighting Periscopes	Newport News Shipbuilding & Drydock Co.
xlii	On or about September 14, 1926	Atlantic City, N. J.	1 meter Range Finder Taximeters	Brazilian Naval Attache

xliii	On or about May 18, 1926	Helsinki, Finland	1) 5, 6 meter Range Finders 2) 11, 4 meter Range Finders	Finnish Government
xliv	On or about November 25, 1925	Moukden, China	50, Stereo Range Finders	K. A. Swamberg
xlv	On or about April 9, 1925	Warsaw, Poland	Shear Telescopes	Trojanowski & Lozinski Bros., Ltd.
xlvi	On or about March 24, 1925	Spezia, Italy	Range Finders Periscopes	F. Todeschini
xlvii	On or about June 30, 1924	London, England	40, 80 centimeter Infantry Range Finders	Persons unknown who communicated with Bausch & Lomb Optical Co., Ltd., London, England

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	(a)		(b)	(c)
	When	*Where*	*Instruments*	*Name of Prospective Buyer*
xlviii	On or about December 12, 1923	Santa Barbara, Honduras	Range Finders	Paul C. Heller
xlix	On or about October 10, 1923	Ottawa, Canada	Floating Range Finder	Instruments, Ltd.
l	On or about October 4, 1923	New York City	Instruments used in aerial navigation	National Association of Manufacturers for Etablissements Aera
li	On or about August 2, 1923	Washington, D. C.	Submarine Periscopes	Brazilian Navy
lii	On or about July 9, 1923	Argentina	Stereoscopic Range Finders	Republic of Argentina

On or about December 15, 1922	Helsingfors, Finland	80 centimeter Range Finder	Captain D. Daragan
On or about March 3, 1922	Washington, D. C.	1) Range Finders 2) Fire Control Instruments 3) Anti-Aircraft Telescopes	Ministry of Czechoslovakia

15, 16. Bausch & Lomb since subsequent to May, 1921, has either sold or offered to sell military optical instruments for use outside of the United States, only after having first obtained the consent of Zeiss, as alleged in paragraphs 17 (e) and 22 (e) of the indictment in the following instances: (The Government does not know whether in fact the offer of sale was consummated in each instance, but this is unquestionably known to the defendants. The instances set forth below are those presently known to the Government based on documents produced by Bausch & Lomb before a Grand Jury, pursuant to a subpoena duces tecum. The Government reserves the right to prove other instances based on other records of Bausch & Lomb.)

	When	*Where*	*Instruments*	*Vendee*	*Price*	*Zeiss Consent When Where Obtained*	*Price Agreement When Where Made*
(i)	On or about April 30, 1936	Rochester, New York	One to six 4-meter altitude meters	Argentine Naval Commission	$22,000 to $26,000	See Exhibits G. & H. attached	
(ii)	On or about February 12, 1936	New York City	2–½ meter coincidence range finders	United Dry Docks, Inc.	$5,600 to $ 6,200 each	Facts in Defendants' possession and presently unknown to Government	
(iii)	On or about August 21, 1934	New York City	Stereo Range Finders	Amtorg Trading Corp.	$24,000 to $25,000 each	See Exhibits G. & H. attached	
(iv)	On or about November 29, 1933	Groton, Conn.	2 15 ft. stereo range finders	Electric Boat Co.	$9,500	See Exhibits I. & J. attached	

(v)	On or about November 23, 1933	Rochester, New York	1 4-meter altitude meter	Government of Siam	$24,000	See Exhibits K. & L. attached
(vi)	On or about March 28, 1928	Rochester, New York	10 to 15 boresights	Brazilian Government	$180/205	See Exhibits M. & N. attached
(vii)	On or about January 18, 1926	Hartford, Conn.	50/100 80 centimeter coincidence range finders	Colts Patent Fire-arms Mfg. Co.	$700 each	Facts in defendants' possession and presently unknown to Government
			50/100 Battery Commander Telescopes		$490 each	
(viii)	On or about December 31, 1925	Unknown	Submarine Gun Sight telescopes	Unknown	$375 each	See Exhibits O. & P. attached

	408 When	408 Where	407 Instruments	407 Vendee	407 Price	406 Zeiss Consent When Obtained	406 Zeiss Consent Where Obtained	406 Price Agreement When Made	406 Price Agreement Where Made
(ix)	On or about August 11, 1925	New York, New York	1 meter coincidence range finder	Unknown	$950	See Exhibits attached		Q. & R.	
(x)	On or about June 30, 1925	Brazil	12-foot coincidence range finders	Brazil Naval Commission	$3,420 each	See Exhibit attached		S	

17. Bausch & Lomb has refused to permit the following persons, firms and corporations to engage in the production and distribution of military optical equipment outside of the United States or to use any of the devices, information, machinery or equipment of Bausch & Lomb for such production and distribution, as alleged in paragraphs 17 (e) and 22 (e) of the indictment: (Such instances are presently known to the Government and the Government reserves the right to prove other instances if information regarding the same becomes available to the Government before the trial.)

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	(a)		(b)	(c) and (d)
	When	*Where*	*Name of Person*	*Substance of refusal, and readiness, willingness, and ability of applicants*
(i)	On or about July 1, 1938	New York City	Standard Telephones and Cables, Ltd. of London, England.	Refusal set forth in letter annexed as Exhibit T. William E. Leigh indicated readiness and ability on June 30, 1938, at Rochester.
(ii)	1938	Rochester	Military representative of British government	Oral, by such military representative.
(iii)	End 1937 or early 1938	Rochester	Military representative of Italian government	Oral, by such military representatives.

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18. Zeiss has refused to sell military optical instruments for use within the United States unless Bausch & Lomb consented to such sale, as alleged in paragraphs 17 (f) and 22 (f) of the indictment, in the following instances: (Such instances are presently known to the Government based on documents produced by Bausch & Lomb before a Grand Jury pursuant to a subpoena duces tecum. Other instances may be disclosed by other records of Bausch & Lomb, or records of Zeiss or of the defendant Carl Zeiss, Inc., and the Government reserves the right to prove such other instances from such other records.)

	When	*Where*	*Instruments*	*Name of Prospective Buyer*
(i)	On or about July 5, 1922	Jena, and New York	One heliograph	Fergus Electric Co
(ii)	On or about November 7, 1929	The Hague Holland	Periscopes	United States of America
(iii)	On or about January 25, 1930	Paris, and The Hague	Range Finders	Electric Boat Company

19. Zeiss has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb, as alleged in paragraphs 17 (f) and 22 (f) of the indictment. The instances set forth below are those presently known to the Government based on documents produced by Bausch & Lomb before a Grand Jury pursuant to a subpoena duces tecum. The Government reserves the right to prove other instances from other records of Bausch & Lomb, records of Zeiss, and records of the defendant Carl Zeiss, Inc.

	When (a)	Where	Instruments (b)	Vendee (c)	Price	Bausch & Lomb Consent When Where Obtained (d)	Price Agreement When Where Made (e)
(i)	On or about March 7, 1928	Jena/ The Hague	Submarine Periscopes	United States Government	$275/ 200 each	See Exhibit U attached.	
(ii)	On or about April 4, 1928	Jena/ The Hague	1 Stereo Altimeter 4-meter base	United States Naval Attache at The Hague	$10,500	Facts solely within defendant's knowledge, and presently unknown to Government	
(iii)	On or about Sept. 18, 1935	Jena/ Berlin	1 Flak-visior	Military Attache of United States at Berlin	$3630	Facts solely within defendant's knowledge, and presently unknown to Government	
(iv)	On or about March 1, 1938	Groton Conn./ Jena	Submarine Periscopes	Electric Boat Company	Unknown	See Exhibit V attached	Facts solely within defendant's knowledge, and presently unknown to Government

20. (a) In July or August 1936, Zeiss refused to permit the Bendix Aviation Corporation to use any of its devices,
418 knowledge, instruments and equipment for the production and distribution of military optical instruments in the United States in competition with Bausch & Lomb.

(b) and (c) See paragraph (a) above.

(d) Bendix's representative in Europe, Francis Stanton, indicated his readiness, willingness and ability to compensate Zeiss for such use. The instance set forth above is the only instance presently known to the Government and is based on documents produced by Bausch & Lomb before a grand jury pursuant to a subpoena duces tecum. Other
419 instances may be disclosed by other records of Bausch & Lomb, of Zeiss, and of the defendant Carl Zeiss, Inc., and the Government reserves the right to prove such instances from such other records.

21, 26. Carl Zeiss, Inc., subsequent to on or about December 11, 1925, has refused to sell military optical instruments for use in the United States, as alleged in paragraph 17 (h) of the indictment, in a number of instances. The names of the prospective purchasers, the dates of the refusals, and the exact nature of the military optical instruments are presently unknown to the Government.

22. Bausch & Lomb refused to sell military optical instru-
420 ments to prospective purchasers if such instruments were eventually to go out of the United States of America as alleged in paragraph 19 (a) of the indictment in the following instances: (Such instances are presently known to the Government based on documents of Bausch & Lomb produced before a grand jury pursuant to a subpoena duces tecum. There may be other instances based on other records of Bausch & Lomb, and the Government reserves the right to prove such other instances.)

	When	*Where*	*Instruments*	*Name of Prospective Buyer*
i	On or about February 26, 1940	New York City	Height Finders	American Ordnance Corp.
ii	On or about December 12, 1939	New York City	2 and 4 meter Range Finders	Hoepli & Co.
iii	On or about November 6, 1939	New York City	3 Range Finders	Aviation Equipment & Export Co.
iv	On or about January 6, 1939	New York City	1) 8 Goniometers Graduated in Mills 2) 2 Squares 3) 2 Telescopes for Battery Commanders 4) Prismatic Compasses 5) 2 Field Glasses 6) 2 Telemeters, one meter base 7) 2 Telescopic, indexed quadrants 8) 2 Circumferentors with Tripods 9) 2 Modern Telephone Communicating Systems	Frank Sheridan Jonas

23. Bausch & Lomb has refused to enter into arrangements whereby the information, knowledge, equipment, and
424 machinery of Bausch & Lomb would be sold or employed in the manufacture of military optical instruments intended for use outside the United States as alleged in paragraph 19 (b) of the indictment in the following instance: (Such instance is presently known to the Government based on documents of Bausch & Lomb produced before a Grand Jury pursuant to a subpoena duces tecum. There may be other instances presently unknown to the Government and the Government reserves the right to prove such other instances.)

(a), (b), and (c). Bausch & Lomb refused to enter into
425 such an arrangement with William E. Leigh, of New York City, acting on behalf of Standard Telephones and Cables, Ltd., of London. Refusal was in writing by letter dated July 1, 1938 addressed to Mr. Leigh in New York City and a copy of this letter is annexed hereto as Exhibit T. This refusal took place after negotiations were had by Mr. Leigh first with representatives of Bausch & Lomb in New York City, and later with representatives of Bausch & Lomb, including the defendant Bausch, in Rochester.

24. Zeiss has shipped and Bausch & Lomb has received military optical instruments through the Port of New York as alleged in paragraphs 19 (c) and 24 (a) of the indictment
426 in the following instance: (Such instance is presently known to the Government based on documents of Bausch & Lomb produced before a Grand Jury pursuant to a subpoena duces tecum. There may be other instances based on other records of Bausch & Lomb, the records of Zeiss, and the records of Carl Zeiss, Inc., and the Government reserves the right to prove such instances from such other records.)

Zeiss Shipment		*Bausch & Lomb Receipt*				*Price Agreement*	
When	*Where*	*When*	*Where*	*Instruments*	*Prices*	*When*	*Where*
On or about September 15, 1928	Venlo/ Rotterdam, Holland	On or about September 25, 1938	New York	One 8 meter Stereo Telemeter	Price to United States Government approximately $24,460.00	Full knowledge as to circumstances surrounding defendants' agreement as to prices is in possession of defendant Bausch & Lomb.	

25. (a) and (b) Zeiss has collected and received from Bausch & Lomb royalty payments as alleged in paragraphs 19 (d) and 24 (b) of the indictment. The royalty payments were made by check or draft drawn by Bausch & Lomb on its own bank payable to and deposited with The Chase National Bank of the City of New York, 18 Pine Street, New York City, for the account of Zeiss, in the years 1938 and 1939, and for the account of Nederlandsche Instrumenten Compagnie (Nedinsco), a wholly owned subsidiary of Zeiss, in the year 1937, on the dates set forth below as royalty for the calendar year stated:

Royalty Period	*Date of Payment*	*Total Royalty Payable*	*Amount Paid*	*Amount deducted by Bausch & Lomb, including amount withheld for U. S. Tax*
1936	May 5, 1937	$42,140.37	$35,819.31	$6,321.31
1937	April 14, 1938	46,417.32	39,454.72	6,962.60
1938	July 20, 1939	41,209.74	34,714.92	6,494.82

26. Carl Zeiss, Inc., has refused to sell military optical instruments for use in the United States as alleged in paragraph 19 (e) of the indictment, on one or more occasions. The names of the prospective purchasers, the dates of the refusals and the exact nature of the military optical instruments are presently unknown to the Government.

Samuel S. Isseks,
SAMUEL S. ISSEKS,
Special Assistant to the Attorney General,
Attorney for the United States of America.

Office and Post Office Address,
Room 2101, United States Court House,
Foley Square,
Borough of Manhattan,
New York, New York.

Dated, New York, April 26th, 1940.

EXHIBIT A ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

This Exhibit is an agreement dated April 28, 1921, written in the German language, a translation of which follows as Exhibit B. 433

EXHIBIT B ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

BAUSCH & LOMB OPTICAL CO.

Translated WM*EC
November 4, 1926

Agreement between the firm of Carl Zeiss, in Jena and the firm of Bausch & Lomb Optical Co., in Rochester: 434

Paragraph 1.

The firm of Carl Zeiss agrees to assist the firm of Bausch & Lomb in the sphere of Military instruments (Army and Navy) in the manner that:

a.) It places at the disposition of the firm of Bausch & Lomb all of the drawings and other supporting data necessary for the manufacture in America;

b.) It participates in the scientific and constructive improvement of existing instruments as well as in the development of new designs and problems with the same amount of interest as it would bestow on its own tasks; 435

c.) It places at the disposition of the firm of Bausch & Lomb, manufacturing rights for the United States of America for all existing inventions and industrial pro-

Dated, New York, April 26th, 1940.

tected rights (note of translator: "patent rights") and those that out of the joint labor may still be created;
436 (in this connection new patents in the United States in the Military line shall not be acquired in the name of the firm of Carl Zeiss, but for its account in the name of the firm of Bausch & Lomb);

d.) It assists in the engagement of the proper scientific and technical personnel and if desired will temporarily send some of its higher officials to America (traveling expenses for account of Bausch & Lomb).

Paragraph 2.

437 In return the firm of Bausch & Lomb agrees to pay to Carl Zeiss a royalty on its total gross earnings in the Military line within and without the U. S. A. In this is comprised every shipment to Army and Navy authorities, as well as every sale of Military instruments to dealers and individual Military personages.

Exempt are field glasses, unless these form parts of other Military instruments or become Military instruments by the addition of special devices.

The royalty is calculated from the net invoice amount for the instruments furnished during the existance of this agreement. During the first seven years it amounts to 7%, in the
438 consecutive seven years to 6%, and then it is reduced consecutively each year by ½% to ½% in the twenty-fifth year. The reduction below 6% does not take place in the case of instruments that are patented (paragraph 1c) during the existance of the patent, unless, that the letter patent has reference to secondary parts only, in which case the parties shall come to an agreement as to a proper reduction.

Exhibit B Annexed to Bausch & Lomb Bill of Particulars.

Paragraph 3.

B. & L. obligate themselves not to sell, directly or indirectly, Military instruments to countries outside of the United States of America, and vice versa Carl Zeiss obligate themselves not to sell such instruments, directly or indirectly to the United States unless the parties have come to an agreement regarding the conditions of sale and the respective territories of distribution. 439

Paragraph 4.

In furtherance of the aims of this agreement B. & L. in Rochester will create a new Department solely responsible to the Board of Directors, which is charged with the independent development of all scientific and technical tasks within the Military scope and the maintenance of connections with Jena. The parties will come to an agreement as regards the heads to be placed in charge of this department. 440

Paragraph 5.

Workmen and employees of one party cannot even within one year after leaving the services, be employed by the other party, unless with the consent of the first party.

Paragraph 6.

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Within the sphere of non-military articles both parties are in free competition in the World's markets (inclusive of North America and Europe) during the existance of this contract. They shall, however, endeavor to give due consideration to one another relative to their common interests,

as may develop from the close co-operation in the Military line and they make the reservation of coming to special agreements regarding respective territories and non-military
442 articles. In particular they will place new projects at the disposition of each other under royalty agreements.

Paragraph 7.

Both parties shall, in the Military line of instruments and in all other lines of endeavor, where they co-operate technically within the provisions of this agreement, exchange their manufacturing experience and give access to the workshops to confidential representatives of the other party. They shall take care, in this connection, that the advantages gained
443 from the co-operation shall not be shared by third parties, not concerned. Therefore, each party shall place at the disposition of the other, inventions in the Military line, acquired from a third party under the same favorable conditions under which it, itself, is making use of them.

If Bausch & Lomb should acquire patent rights not resulting from the Zeiss co-operation (paragraph 1c) but independent, therefrom, from employees of Bausch & Lomb, these patents also shall be at the disposition of Carl Zeiss or of such enterprises in which Carl Zeiss is interested with at least one third of the capital stock, for the territory outside of the United States against the payment of a royalty of
444 4%, during the existance of the patent.

Paragraph 8.

The mutual obligation regarding the exchange of Military designs shall be void whenever the highest home Government of one party expressly demands that they be kept in confidence in the interest of the nation.

Exhibit B Annexed to Bausch & Lomb Bill of Particulars.

Paragraph 9.

The contracting parties agree to keep the fore-going agreement in strict confidence as regards a third party and to guard silence concerning this agreement also with their own employees as far as this may be practical under the circumstances. 445

Paragraph 10.

The parties recognize as concluded all previous agreements existing between them and that any claims on one another arising therefrom do not further exist.

(Provision in letter of Apr. 28th.) 446

Paragraph 11.

This agreement enters into force with the first of May 1921, and continues until April 30, 1941, providing however for the continuance of the royalty payment according to paragraph 2.

Paragraph 12.

If, by reason of unforseen political events, the execution of this contract shall be made impossible, temporarily or permanently, or the firm of Carl Zeiss limited in the enjoyment of its full license claims, this agreement shall be suspended for that time and upon an appeal the board of arbitrators shall make such dispositions as seem necessary in order to carry out the will of the parties to this agreement under the changed conditions, as far as possible. 447

Exhibit B Annexed to Bausch & Lomb Bill of Particulars.

Paragraph 13.

448 In the case of differences of opinion, regarding the interpretation or execution of this agreement, between the parties, these differences are to be settled by arbitration. If the parties in such cases cannot agree on a common arbitrator, each party is to appoint its own arbitrator and these two arbitrators in turn will name a third as President. Only such persons are elligible to function as arbitrators, who from the beginning of the dispute have not been personally interested and are in no way employed by either party.

Jena April 28, 1921

449 BAUSCH & LOMB OPTICAL CO.
(signed) per Geo. N. Saegmuller, Vice Pres.

CARL ZEISS
(signed) PPA Dr. Ing. Bauersfeld

(signed) Kotthaus

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EXHIBIT C ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

BAUSCH & LOMB OPTICAL CO.

Translated WM EC
November 5, 1926 451

Supplementary agreement to the Agreement of April 28, 1921, between the firm of Carl Zeiss, in Jena and the firm of Bausch & Lomb Optical Co., Rochester.

In paragraph 2, the third paragraph receives the following wording:

The premium will be calculated from the net invoice amount for the instruments furnished during the existence of this agreement. During the first ten years it amounts to 7%, in the consecutive seven years to 6% and then con- 452
secutively it is reduced each year by ½% to 2% in the twenty-fifth year. The reduction in the rate of premium below 6% does not take place in the case of instruments that are patented (paragraph 1c) durirng the existance of the patent, unless that the letter patent has reference to secondary parts only, in which case the parties shall come to an agreement as to a proper reduction.

Paragraph 3 receives the following wording:

The Firm of Bausch & Lomb obligates itself not to sell, directly or indirectly, Military instruments to countries outside of the United States of America, and vice versa 453
Carl Zeiss obligates itself not to sell such instruments, directly or indirectly, to the United States, excepting under the following conditions:

In the case of inquiries, received by Bausch & Lomb from authorities outside of the United States of America, by Carl Zeiss from the authorities of the United States,

one party informs the other of the inquiry and is obligated to make the protective offer named by the other party. The increase of the protective offer over the normal
454 price for the corresponding quantity of instruments in question shall not be higher than 20%. Both parties are obligated to treat such inquiries as promptly as possible. If the party, that has made the protective offer should, nevertheless, receive the order, it is obligated to cede in full to the other firm the excess price representing the protection. The Firm of Bausch & Lomb besides, has to pay to the firm of Zeiss the royalty on the normal price according to paragraph 2, in case Bausch & Lomb is awarded the order.

455 In the case of inquiries from American shipyards for delivery of optical instruments for the equipment of a ship of a country outside of the United States, the firm of Bausch & Lomb will immediately communicate with Carl Zeiss. The business will then be done in common between both firms in the manner that Bausch & Lomb will furnish those instruments, which they have manufactured heretofore, and Nedinsco through the firm of Bausch & Lomb, the other optical instruments in question, which transaction shall exclude the payment of royalty by Bausch & Lomb to Carl Zeiss and include a commission of not less than net 5% for Bausch & Lomb. A protective offer the same as has been agreed in the above in the case
456 of quotations to authorities does not apply in order not to give another firm the chance of securing the order, in consequence of the high prices of Bausch & Lomb.

Jena, June 27, 1925

CARL ZEISS
(Signed) P.PA. Kotthaus

Rochester,

BAUSCH & LOMB OPTICAL CO.
(Signed) Carl F. Lomb
Vice Pres.

EXHIBIT D ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

BAUSCH & LOMB OPTICAL CO.

457

Translated WM*EC
November 1, 1926

Supplementary Agreement to the Agreement of April 28, 1921, between the firm of Carl Zeiss in Jena and the firm of Bausch & Lomb Optical Co., Rochester.

In paragraph 2, the third paragraph receives the following wording:

458 The premium will be calculated from the net invoice amount for the instruments furnished during the existance of this agreement. During the first ten years it amounts to 7%, in the consecutive seven years to 6% and then consecutively it is reduced each year by ½% to 2% in the twenty-fifth year. The reduction in the rate of premium below 6% does not take place in the case of instruments that are patented (paragraph 1c) during the existance of the patent, unless that the letter patent has reference to secondary parts only, in which case the parties shall come to an agreement as to a proper reduction.

Paragraph 3 receives the following wording:

459

The Firm of Bausch & Lomb obligates itself not to sell, directly or indirectly, Military instruments to countries outside of the United States of America, and vice versa Carl Zeiss obligates itself not to sell such instruments, directly or indirectly, to the United States, excepting under the following conditions:

Exhibit D Annexed to Bausch & Lomb Bill of Particulars.

In the case of inquiries, received by Bausch & Lomb from authorities outside of the United States of America, by Carl Zeiss from the authorities of the United States, one
460 party informs the other of the inquiry and is obligated to make the protective offer named by the other party. The increase of the protective offer over the normal price for the corresponding quantity of instruments in question shall not be higher than 20%. Both parties are obligated to treat such inquiries as promptly as possible. If the party, that has made the protective offer should, nevertheless, receive the order, it is obligated to cede in full to the other firm the excess price representing the protection. The firm of Bausch & Lomb besides, has to pay to
461 the firm of Zeiss the royalty on the normal price according to paragraph 2, in case Bausch & Lomb is awarded the order.

In case the inquiries referred to in paragraph 2 and 3 should not come to Bausch & Lomb from a Government, but exceptionally from a commercial house of a country outside of the United States, the firm of Bausch & Lomb is to communicate immediately with the firm of Nedinsco, and, depending on the situation at Nedinsco, either, to make the protective offer named to her by the latter firm, or, to decline the inquiry under pretense. The information in question will be given to the Firm of Bausch & Lomb by the firm of Nedinsco.

462 In the case of inquiries from American shipyards for delivery of optical instruments for the equipment of a ship of a country outside of the United States, the firm of Bausch & Lomb will immediately communicate with Carl Zeiss. The business will then be done in common between both firms in the manner that Bausch & Lomb will furnish those instruments, which they have manufactured hereto-

fore, and Nedinsco through the firm of Bausch & Lomb, the other optical instruments in question, which transaction shall exclude the payment of royalty by Bausch & Lomb to Carl Zeiss and include a commission of not less than net 5% for Bausch & Lomb. A protective offer the same as has been agreed in the above in the case of quotations to authorities does not apply in order not to give another firm the chance of securing the order, in consequence of the high prices of Bausch & Lomb. 463

Under the provision of paragraph 3, for the protective offer, only the normal price fixed by the firm of Carl Zeiss is subject to royalty payment, whereas the increase above the normal, to be turned over to the latter firm, is not subject to royalty.

In case that the firm of Bausch & Lomb cannot meet the normal price fixed by the firm of Carl Zeiss, but shall be forced in consequence of the higher cost of production to demand more, this increase, besides the normal price, is subject to royalty, whereas the increase to be paid to the firm of Carl Zeiss on the normal price is not considered subject to royalty. 464

If a commission to an agent is to be paid, which as far as possible should be denied, but which nevertheless in certain cases cannot be avoided, this commission, calculated into the selling price, is also subject to royalty payment.

If the firm of Bausch & Lomb is furnishing to American shipyards, optical instruments as equipment for a ship of a country outside of the United States, all instruments in which the ideas of construction of the firm of Carl Zeiss have been used, shall, besides the trade name of Bausch & Lomb, be engraved with the designation, "System Nedinsco-Zeiss". Instruments according to the construction of 465

Exhibit E Annexed to Bausch & Lomb Bill of Particulars.

Bausch & Lomb shall bear only their name. On instruments furnished by Nedinsco the name of Nedinsco will
466 appear next to the name of Bausch & Lomb.

Jena, October 28, 1925
PPA Carl Zeiss

(Signed) Frostmann

Rochester, Dec. 11, 1925
BAUSCH & LOMB OPTICAL CO.

(Signed) Carl F. Lomb
Vice Pres.

EXHIBIT E ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

467 This Exhibit is an agreement dated November 26, 1926, written in the German language, a translation of which follows as Exhibit F.

468

EXHIBIT F ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

AGREEMENT BETWEEN CARL ZEISS, JENA

469

and

BAUSCH & LOMB OPTICAL COMPANY OF ROCHESTER, N. Y., U. S. A.

Paragraph 1

The firm of Carl Zeiss agrees to assist the Bausch & Lomb Optical Company in the production and sale of Military instruments as follows:

470

(a) It will place at the disposal of the Bausch & Lomb Optical Company all of the drawings and other supporting data necessary for the manufacture in America:

(b) It will participate in the scientific and structural improvement of existing instruments as well as in the development of new designs and the solution of new problems with the same amount of interest that it would bestow on its own work.

(c) It will place at the disposal of the Bausch & Lomb Optical Company, manufacturing rights (patent rights) in the United States of America for all existing inventions and protected processes as well as those inventions and processes that may in the future be created by the joint efforts of the firm of Carl Zeiss and the Bausch & Lomb Optical Company. New pat- 471

ents in the United States in the Military line will not be acquired in the name of Carl Zeiss but at its ex-
472 pense in the name of the Bausch & Lomb Optical Company.

(d) It will assist the Bausch & Lomb Optical Company in the employment of proper scientific and technical personnel and if desired, will send temporarily, some of its high officials to America, traveling expenses to be paid by the Bausch & Lomb Optical Company.

Paragraph 2

In return, the Bausch & Lomb Optical Company agrees
473 to pay to the firm of Carl Zeiss, a royalty on its total sales in the Military line within and outside the United States of America. In this total, all sales of Military instruments to the Army and Navy authorities, to dealers and individuals are to be included.

Field glasses are exempt unless they form parts of other Military instruments or become Military instruments by the addition of special devices.

For the first ten years, this royalty, which will be calculated from the net invoice amounts of the instruments furnished during the existence of this agreement, will be 7%, for the next seven years 6% and it will thereafter be reduced
474 by ½% each year to 2% in the 25th year. There will be no reduction in the rate of royalty below 6% in the case of patented instruments during the existence of the patent unless the patent relates to parts of secondary importance only, in which case the parties shall come to an agreement as to the proper reduction (see Paragraph 1, article c).

Exhibit F Annexed to Bausch & Lomb Bill of Particulars.

Paragraph 3

The license hereby granted is exclusive, the firm of Carl Zeiss agrees that it will grant no license to another American manufacturer. 475

Paragraph 4

In furtherance of the aims of this agreement, the Bausch & Lomb Optical Company in Rochester will create a new Department responsible solely to the Board of Directors, which is charged with the independent development of all scientific and technical tasks within the Military scope and the maintenance of associations with the firm of Carl Zeiss in Jena. The parties will come to an agreement as 476 regards the heads to be placed in charge of this department.

Paragraph 5

Neither party will, without the consent of the other, employ persons who have left the service of the other within one year.

Paragraph 6

In the production and sale of non-military articles, both parties will remain in unrestricted competition in the World's markets (including North America and Europe) during the existence of this contract. They shall, however, 477 endeavor to give due consideration to one another's interests as those interests may be disclosed by the joint work in the Military line. Special agreements may be made regarding territories on non-military articles. New projects may be placed at each other's disposal under royalty agreements.

Exhibit F Annexed to Bausch & Lomb Bill of Particulars.

Paragraph 7

478 Both parties shall, in the Military line and in all other lines, where they cooperate technically within the provisions of this agreement, exchange their manufacturing experience and give access to their respective manufactories to each others confidential representatives. In this however, they shall use every precaution that the advantages thus gained shall not be shared by disinterested third parties. Inventions in the Military line which may be acquired by either party from a third party shall be placed at the disposal of the other under the same conditions under which they are acquired. If the Bausch & Lomb Optical Company should acquire patent rights not resulting from the Zeiss cooperation but independent therefrom, from its own employees, these patents shall also be placed at the disposal of Carl Zeiss or of such enterprises in which Carl Zeiss is interested to the extent of owning at least ⅓ of the capital stock, for the markets outside of the United States, Zeiss or its affiliated company to pay the Bausch & Lomb Optical Company royalty of 4% during the life of the patent.

479

Paragraph 8

480 The mutual obligation regarding the exchange of Military designs shall be void whenever the highest home Government of one party expressly demands that they be kept in confidence in the interest of the nation.

Paragraph 9

The parties recognize as concluded all previous agreements existing between them and that any claims on one another arising therefrom do not further exist. (Proviso in letter of Apr. 28th, 1921)

Exhibit F Annexed to Bausch & Lomb Bill of Particulars.

Paragraph 10

This agreement is effective as of May 1st, 1921 and continues in force until April 1st, 1941, with the reservation of 481
the prolongation of the license (paragraph 2).

Paragraph 11

If, by reason of unforeseen political events, the execution of this contract shall be made impossible, temporarily or permanently, or the firm of Carl Zeiss limited in the enjoyment of its full license claims, this agreement shall be suspended for such time as is necessary and upon an appeal, a board of arbitrators as subsequently designated, shall make such dispositions as may seem necessary to carry out as far as possible, the will of the parties to this agreement, 482
under the changed conditions.

Paragraph 12

In the case of differences of opinion, regarding the interpretation or execution of this agreement between the parties, these differences are to be settled by arbitration. If the parties in such cases cannot agree on a common arbitrator, each party is to appoint its own arbitrator and these two arbitrators in turn will name a third as Chairman. The decision of the arbitrators on any question submitted to them shall be final and conclusive between the parties. Only such persons are eligible to function as arbitrators, who are 483
not personally interested in the outcome of the dispute and not employed in any way by either party.

Rochester, N. Y. November 26, 1926

Bausch & Lomb Optical Company
Carl F. Lomb, Vice-President

Carl Zeiss, Jena December 24, 1926

EXHIBIT G ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

484

(See Opposite) ☞

485

486

y fcy 146
3/2/71 mm

Mil. Boot. 382

April 29, 1936

Carl Zeiss
Jena, Germany

Attention of Mr. Bouffer.

Dear Sir:

The Argentine Naval Commission of the United States located in Washington, D.C. has sent us an inquiry to the effect that they are interested in the procurement of from one to six Height Finders of 4 m base including mount in accordance with U.S. Army Specifications. We, therefore, took occasion to cable you today, as per copy inclosed, reading as follows:

HIERIGE ARGENTINISCHE MARINE KOMMIS ION ANTRAGT EINS BIS SECHS MOMENTANS:ER VIER METER BA AERMETIP BRABSICHTIGEN STAFFELPARISARGECHT SECHSUNDZWANZIG BIS ZWEIUNDZWANZIGTAUSEND DOLLAR KABELT EINVERSTANDNIS

We now await your reply.

Very truly yours,

WM:FC

BAUSCH & LOMB OPTICAL CO.

487

488

489

EXHIBIT G1 ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

490

BAUSCH & LOMB OPTICAL COMPANY
ROCHESTER, N. Y.

CABLE ADDRESS "BAUSCHLOMB" ROCHESTER

CLASS OF SERVICE	SIGNS
Charge xx	DL-Day Letter
Collect	NM-Night Message
Day Letter	NL-Night Letter
Night Letter	LCO-Deferred Cable
Night Message	NLT-Cable Letter
Serial Service	SER-Serial Service
Straight Telegram	WLT-Week-End Letter

491

Cable xxx
Sent via W. U. Postal

AUGUST 20, 1934

LCD
ZEISSWERK JENA

RUSSLAND ANFRAGT HOEHENMESSER VIER METER SCHLAGEN VOR ANZUBIETEN EIN INSTRUMENT FUENFUNDZWANZIG TAUSEND DOLLAR DREI INSTRUMENT JE VIERUNDZWANZIG DOLLAR PUNKT KABELT EINVERSTAENDNIS

MILITARY DEPT.

492

This telegram is sent in accordance with outlines on back of regular telegram blank

BY DIRECT WIRE FROM

WESTERN UNION

BHG98 VIA RCA=CD JENA 9 30 1751 LC

BAUSCHLOMB=ROCHESTER (NY)=

AUSNAHMSWEISE EINVERSTANDEN ANGEBOTSABGABE ZU GENANNTEN PREIS.

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

EXHIBIT H ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

493

494

495

EXHIBIT H-1 ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

496

(See Opposite) ☞

497

498

military

BY DIRECT WIRE FROM 4 Aug 1940 3/14/044

WESTERN UNION

CLASS OF SERVICE

This is a full-rate Telegram or Cable-gram unless its de-ferred character is in-dicated by a suitable sign above or preced-ing the address.

SIGNS

DL = Day Letter
NM = Night Message
NL = Night Letter
LC = Deferred Cable
NLT = Cable Night Letter
Ship Radiogram

The time shown in the date line on full rate telegrams and day letters, and the time of receipt at destination as shown on all messages, is STANDARD TIME.

RHE1 VIA RCA=CD JENA B AUG 21 1044

BAUSCHLOMB=ROCHESTER (NY):

=PREISE HOEHNMESSER 4 M HUSSLAND EINVERSTANDEN.

9277

8/21/39 1 $25,000.00

3 $24,000.00 ea.

8/31 9/1

THE QUICKEST, SURE AND SAFEST WAY TO SEND MONEY IS BY TELEGRAPH OR CABLE

499

500

501

EXHIBIT I ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

BAUSCH & LOMB OPTICAL COMPANY

502 ROCHESTER, N. Y.

CABLE ADDRESS "BAUSCHLOMB" ROCHESTER

CLASS OF SERVICE		SIGNS
Charge	xxx	DL-Day Letter
Collect		NM-Night Message
Day Letter		NL-Night Letter
Night Letter		LCO-Deferred Cable
Night Message		
Straight Telegram		XNLT-Cable Letter
Cable	xxxx	WLT-Week-End Letter

503 Sent via W. U. Postal

NOVEMBER 27, 1933

NLT

ZEISSWERK JENA

ELECTRIC BOAT COMPANY ANFRAGT ZWEI ENTFERNUNGSMESSER BESTIMMUNGSLAND UNGEMANNT BEABSICHTIGEN ANZUBIETEN FUENFZEMN FUSS STERBO MARINENODELL STURKPHEIS NEUNTAUSEND FUENFHUADERT DOLLAR KABELT EINVERSTAENIMIS

BAUSCHLOMB

MILITARY DEPARTMENT

504

BY DIRECT WIRE FROM

WESTERN UNION

CLASS OF SERVICE

SIGNS
DL = Day Letter
NM = Night Message
NL = Night Letter
LC = Deferred Cable
NLT = Cable Night Letter
Ship Radiogram

RHE5 VIA RCA=CD JENA 11/10 NOV 28 NLT

BAUSCHLOMB=ROCHESTER (NY)=

EUER GESTRIGES TELEGRAMM ENTFERNUNGMESSERANFRAGE MIT ANGEBOT EINVERSTANDEN.

Quote to Electric Boat Company $9500.00 per C.B. who called V.B.D. who agreed to this price.
D.H.W. Nov 28 33.

WESTERN UNION GIFT ORDERS ARE APPROPRIATE GIFTS FOR ALL OCCASIONS

EXHIBIT J ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

505

506

507

EXHIBIT K ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

508

(See Opposite) ☞

509

510

[redacted] INSTRUMENTEN COMPAGNIE

„NEDINSCO"

YJE 127

TELEFOON: VENLO 033
TELEGR.-ADRES: NEDINSCO-VENLO
A.B.C. CODE 5e ED.
MORSE CODE

VENLO (HOLLAND), [redacted]
POSTBUS 40 29. November 1933

H/VIII/6197 Dr/Vy

Betr. Ihr Telegramm v.21.11.33.

Betr. 4 m Höhenmesser Siam.

Firma

Bausch & Lomb

Rochester.

Wir bestätigen Ihnen den Eingang des obigen Telegramms:

„Siam anfragt Preis einem Höhenmesser vier Meter Spezialstativ verwendbar mit Sperry Rechengerät. Vorschlagen anzubieten unseren Höhenmesser zu vierundzwanzigtausendeinhundert Dollar kabelt Einverständnis."

welches wir telegrafisch wie folgt beantworteten:

„As per your telegram of 20th inst. agree with offer Siam."

Sie wollen daraus ersehen, dass wir damit einverstanden sind, dass Sie an die Behörde in Siam den Höhenmesser zu den von Ihnen genannten Preis anbieten.

Hochachtungsvoll

n.d.N. V. Nederlandsche
Instrumenten-Compagnie
„NEDINSCO"

511

512

513

EXHIBIT L ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

514

(See Opposite) ☞

515

516

BY DIRECT WIRE FROM

WESTERN UNION

CLASS OF SERVICE

This is a Telegram or Cable-gram unless the character thereof is indicated by a suitable sign above or preceding the address.

SIGNS

DL = Day Letter
NM = Night Message
NL = Night Letter
LC = Deferred Cable
NLT = Cable Night Letter
Ship Radiogram

The filing time shown in the date line on full rate telegrams and day letters, and the time of receipt at destination or check on all messages, is Standard Time.

RHGB6 VIA RCA=CD JENA 4 21 1755

BAUSCHLOMB=ROCHESTER (NY)=

ZMUDZAXBUT WOJPAXHJIB.

As per your telegramm of 20th inst. agree with offer Siam

THE QUICKEST, SUREST AND SAFEST WAY TO SEND MONEY IS BY TELEGRAPH OR CABLE

EXHIBIT M ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

520

(See Opposite) ☞

521

522

N. V. NEDERLANDSCHE [redacted] COMPAGNIE

„NEDINSCO"
Br/El
№ 9865

Ihr Telegramm vom 10.3.28

DEN HAAG, den 16. März 1928
POSTBOX 191

Firma Bausch & Lomb, Optical Company

Rochester

Wir bestätigen den Eingang Ihres Telegramms:

BIACP	=	Have an inquiry for (-) from (-)
VEIBI	=	10
ZOEBO	=	to
VEBIE	=	16
GALEPUBNTP	=	Boresights
BRABBOVII	=	Brazilien
VIAAMORBOS	=	via Amerika
HARCESCO	=	Marine Department
OCKCI	=	exactly as (-)
ZONIB	=	Type
ZEIPB	=	as previously supplied
ZOSPB	=	to them
BEPOB	=	and to
ZINOZ	=	our
HARCESCO	=	Marine Department
VESLA	=	We propose
ZEVAZ	=	to supply
BIESE	=	diese
ZIOEB	=	ourselves
ZIBBE	=	at following price
ZVIKO	=	$ 180.—
ZOBUV	=	Please telegraph
ZIGVI	=	agreement
ZIBBP	=	stop
ZINOLI	=	As per your telegram of 8th inst.

523

524

525

Exhibit M Annexed to Bausch 3 Lomb Bill of Particulars.

(See Opposite) ☞

AIBOE = agree to the proposal
IJSEF = proceed

YESSO = quotation
ARMEE = Brass.

Die Bezeichnung = GALEPSEHEP = haben wir nach unserem Code übersetzt in = Voresighte =. Wir können aber auch mit diesem Ausdruck nichts anfangen, da wir nicht wissen, was tatsächlich damit gemeint ist und wir haben deshalb bei Ihnen zurückgefragt wie folgt:

ENOSE = as per your telegram of the 19th inst.
FEOSE = what is the meaning of

GALEPSEHEP = Voresighte.

Hochachtungsvoll

N.V. Nederlandsche
Instrumenten Compagnie
voor de Directie

529

530

531

EXHIBIT N ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

532

(See Opposite) ☞

533

534

POSTAL TELEGRAPH - COMMERCIAL CABLES

TELEGRAM

FY Pilo Carl Zeiss JENA MARCH 26 19 28

BAUSCH & LOMB OPTICAL CO

ROCHESTER N Y

BETOXHRBOV GALEPÚBMTP BRANNOVII

We hereby give Consent

Offer

Bausch

Pfaye.

Mabitang

535

536

537

EXHIBIT O ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

COPY OF TELEGRAM FOR FILE

538 BAUSCH & LOMB OPTICAL COMPANY
ROCHESTER, N. Y.

CABLE ADDRESS:
"BAUSCHLOMB" ROCHESTER

DECEMBER 30, 1925

ZEISSWERK JENA

Classification

COGNYOIROZ LYACS FY UNOCCABU OHNEFABULA NOCHBIBO HEXMECOFME OTIEXLYGLE

Translation:

539

COGNY	:	U. S. of America
OIROZ	:	Shipyard
LYACS	:	Have written for quotation
		YFY:YFY
UNOCCABU	:	UNOCCABU
OHNE	:	Ohne
FABULA	:	Fabula
NOCH	:	Noch
BIBO	:	Bibo
HEXME	:	Intended for
COFME	:	Peru
OTIEX	:	Telegraph at once
540 LYGLE	:	What are we to quote

N.V. NEDERLANDSCHE INSTRUMENTEN COMPAGNIE.

DIRECTIE: DEN HAAG. JAVASTRAAT 44. TELEFN.: 10170. 71 TELEGR.-ADR.: NEDINSCO-HAAG A. B. C. 6th ed. FABRIEK: VEMLO MOLENBROEKSTR. B 13 TELEFN. 000

„NEDINSCO"
Br/El
F° 27/4789

DEN HAAG, den 31. December 1925
POSTBOX 181.

Ref.: Ihr Telegramm vom 30.12.25

Betr.: Anfrage nach Eboots-Zielfernrohren.

4 C 19

JAN 5

Firma Bausch & Lomb, Optical Company

Rochester.

1/1 1/1

Vereinigte Staaten Nordyork

Wir bestätigen den Eingang Ihres Telegramms:

COCEIOIROS	=	Basutoland Shipyard (!)
LIACS	=	Have written for quotation
UFU	=	2
BIOCCABU	=	Eboots-Zielfernrohr 5X mit einem Okular
ohne	=	ohne
FABELA	=	Farbglas
BOCEBIBO	=	Nachtbeleuchtung
EEIENE	=	intended
COPNE	=	Peru
OFIEI	=	telegraph at once
ZIGLE	=	what are we to quote for

worauf wir Ihnen wie folgt drahteten:

Ebique	=	Eboots-Zielfernrohr 10
lycee	=	if you quote make piece as follows
nonef	=	$ 375.—/

Bei der Preisberechnung haben wir, wie Sie aus unserem Antworttelegramm entnehmen wollen, unser Eboots-Zielfernrohr C/10 zu Grunde gelegt, mit einem Sicherheitszuschlag von 10%.

N.V. Nederlandsche Instrumenten-Compagnie

EXHIBIT P ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

541

542

543

EXHIBIT Q ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

COPY OF TELEGRAM FOR FILE

544 BAUSCH & LOMB OPTICAL COMPANY
ROCHESTER, N. Y.

CABLE ADDRESS:
"BAUSCHLOMB" ROCHESTER

JULY 24, 1925

ZEISSWERK JENA

Classification

RIACPUKBAI ELOQUENS SBRUGAWHIL FIUDTZVIST YJOTGVAODA
BAUSCHLOMB

Translation:

	RIACP	: Have an inquiry for
545	UKBAI	: 1 meter
	ELOQUENS	: Eloquens
	SBRUG	: Japanese
	AWHIL	: Agent
	FIUDT	: Commercial
	ZVIST	: Vessel
	YJOTG	: What price shall we ask for
	VAODA	: One

546

Offer No. [redacted]

To Bausch & Lomb Optical Co.,

Rochester.

Country:	Price	
	Currency: USA $	
Referring to your enquiry Mil.Dep.9986 of July 25th 1945 we have the honour of making the following offer:	each	total
Subject:		
Coincidence Rangefinder for Navigational purposes Base length: 1 meter magnifying power: 11-diam. provided with Astigmatiser, coloured glasses, electrical illumination of the scale, electric battery, adjusting lath, belt mounting, wooden case	990.--	
according to the annexed list of delivery: XVII-4		
according to pamphlet:		
ordering at the same time 10 pieces		
For completing the outfit we recommend ordering at the same time the following articles:		
Rail Mounting	20.--	
Book " with a Polorus Ring	100.--	
Our prices are quoted:		
fob Rotterdam, not without discount		

EXHIBIT R ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

547

548

549

Exhibit R Annexed to Bausch & Lomb Bill of Particulars.

550

(See Opposite) ☞

551

552

Time of delivery: 10 pieces 12 months

from works and after date of order or after clearing up all special questions respectively.

This period is fixed according to our stock and the manufacturing conditions of today and cannot be binding.

Binding agreements with regard to the period of delivery can only be made on the day that the order is finally given.

Packing dimensions and weights per piece:

Number of cases: ——— piece

Outer measurements about: ——— cub. meter Net weight about: ——— Kilos.

Gross weight about: ———

Shipping instructions:

Detailed instructions concerning the addressing, marking and shipping to be sent together with the order. Formulars for this purpose are supplied by us if necessary.

Terms of payment:

———

Date of validity of this offer till:

November 15th 1935

Special remarks:

CZ-Comm - 1515/3-5

Den Haag, 11th August, 1935.

N.V. Nederlandsche
Instrumenten-Compagnie
voorh. De Stuurs

Ohm

553

554

555

EXHIBIT S ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

(Postal Telegraph Form)

556 72nyq
78NYGC 14 VIA RADIO
JENA JUN 30 935AM

BAUSCH-LOMB
ROCHRNY

ACILISENE OBROKYCFPY ELOQUENS BRANNOVII QUOJORUM OUTRIDER OUTCEPT STAMEN OUTMASTER PEGAJOSO DOWNBEARD ABRIPUISTI

755A

Translation:

557	ACILISENE	:	The agreement is signed
	OBROK	:	We beg to offer the following
	YCFPY	:	12 ft.
	ELOQUENS	:	Coincidence Range Finders
	BRANNOVII	:	Brazil
	QUOJORUM	:	You may quote
	OUTRIDER	:)	$3420.00
	OUTCEPT	:)	
	STAMEN	:	Stand
	OUTMASTER	:	$800.00
	PEGAJOSO	:	Price includes
	DOWNBEARD	:	20%
558	ABRIPUISTI	:	According to agreement

BAUSCH & LOMB OPTICAL CO.

ROCHESTER NEW YORK

July 1, 1938

Mr. William E. Leigh
International Standard Electric Corp.
67 Broad Street
New York, New York

Dear Mr. Leigh:

One of the first steps I took in giving consideration to your proposition which we discussed yesterday was to look into the contractual arrangements to which we are already obligated which I spoke to you about in my conversation.

Our attorneys tell us that we are absolutely tied up in a way that will prevent our giving you the type of assistance you need to get into the manufacture of optical fire control instruments. My thought was that events over the last few years had changed our foreign relationship in a way that might allow us to work with you, but I am definitely satisfied now that such is not the case. Because of this situation, there is no need for us to delay you any further in your plan.

I enjoyed very much your visit here and perhaps at some future occasion I may have the opportunity of meeting you again.

Very truly yours,

BAUSCH & LOMB OPTICAL CO.

Carl L Bausch.

CLBausch:MB

EXHIBIT T ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

559

560

561

EXHIBIT U ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

No. 5146 March 7, 1928

562 Messrs. Carl Zeiss
Jena,
Germany.

Attention: Mr. Forstmann
Subject: Submarine Periscopes
Reference—Your letter Br/Kl No. 7768
of February 11, 1928

Gentlemen:

In answer to your letter of February 11, and your cablegram of February 25, in this respect reading as follows:

	SKAUZ	Our letter of	URREH	Modern
563	UYURY	number	SEUBUM	Sebum
	WIGVAWEHUHG	6768	ESPKY	By
	SEBUM	Sebum	NEDINSCO	Nedinsco
	RHUXF	inquiry	ZVIMX	very
	NOZYF	Embassy	OKBRA	favorable
	EEJUJ	situation	ZGHYS	to your
	BAGUE	altered	OZWUE	business in futur
	NOXYF	Embassy	ZKALX	suggest
	DIJWO	in behalf of	AKVAN	an agreement with
	FLUENTUM	Fluentum	ALEKIGS	Alexius
	NULIJ	Department	NEDINSCO	Nedinsco
	RHOIG	Inquire at	ZRKSO	will quote
564	NEDINSCO	Nedinsco	ZYNKE	with date
	ZKOWK	supply	MAXEE	of delivery
	VLIXI	3	ZVAMX	usual
	OHOLUK	?	ONYMK	foreign
	SEBUM	Sebum	IBUFS	countries
	ZYNKE	with	WEAITH	dollars
	AHUFA	accessories	YITFU	price
	WYEAY	in our opinion	NADPH	delivered F. O. B.
	ZEONK	supply	YGKLI	Rotterdam
	WOHUA	of	YATTAOHSOI	10% for you
	ZIWAM	such	ZOGUW	Please telegraph

Exhibit U Annexed to Bausch & Lomb Bill of Particulars.

We have telegraphed to our Frankfort office, March 1, 1928 the following:

Messrs. Carl Zeiss March 7, 1928 565

STAN:	In reply to telegram		
EISS:	Zeiss	SLEMK:	40
ASUK:	February 25	AIXIN:	And
SRIT:	Consider it favorable	CLEMP:	42
TMON	But	OCTA:	Including
AKTL:	Cannot decide (until)	MANOEPS:	Mancens
YCUK:	Unless we know	ADIV:	And also
UZEL	At what price do—expect to sell	OAKSK:	Separate
ESAR	Caeser	KUSSF:	Prices
ORLK:	Regulation	ALYTY:	Attachments 566
ENUMCE:	Periscopes C	AIXIV:	And also
LELT:	38	ADORI:	Accessories

and in reply to the letter have received your cablegram of March 5, reading as follows:

LTOOJ:	Can quote on as follows
ALFAY:	Attaché
SEBRUCK:	Sebum C
MORLE:	Regulation
SLENE:	40
NANCEDPS	Mancens 567
NICKELSTEEL:	Nickelsteel
AIBIS:	Composition of alloy is
RODTTETURY:	25%
DYOFY:	Diameter
OJOUD:	6 inches
IKYUD:	Length?
UKKAN:	30 ft.

Exhibit U Annexed to Bausch & Lomb Bill of Particulars.

	UOPMY:	$6000
	DONSA:	$275
568	GYPOLINE:	Gyro Line
	UOBOC:	$400
	TYIJA:	$15.00
	TRIANGLEMAGNIFIER:	Triangle magnifier
	UOMME:	$200
	UAFIX	$70.00
	DESICCATOR	Drying apparatus with motor pump
	UCMME:	$200
	EISOB:	Photographic
	CALCAR:	Camera
	CALOS:	$165.00
569	KYLIT:	Price is F. O. B.
	WEJEX:	Rotterdam
	ROGFE:	10%

This cablegram was badly mutilated. We had the telegraph company verify it and with considerable difficulty made the cablegram out as above stated.

In the meantime we telegraphed you the following on March 5:

OSZIC: Repeat unintelligible words in telegram

	BEBUM:	Bebum
570	RYOFY:	Repeat third word
	RYVAF:	Repeat ninth word
	RYVUR:	Repeat fifteenth word
	RYVUZ:	Repeat eighteenth word

and to which we have received your answer as follows:

Messrs. Carl Zeiss March 7, 1928

SEBUUCE:	Sebum C	571
SLENK:	40	
RODTV:	25%	
NICKELSTEEL:	Nickelsteel	
AVIS:	?	
EVFPI:	$275	
DESSICATOR:	Desiccator	
RATEL:	Price is (at)	
NVEMF:	$200	
KYNED:	Price includes commission	
TLLKE:	10%	

572

It will be noted that this cablegrams is also mutilated. Moreover, had it not been for the fact already stated in the above that the telegraph company was able to obtain a correction on your former cablegram, it would not have helped us in solving your other cablegram; inasmuch as evidently you have misunderstood our request for a repetition of the 3rd, 9th, 15th and 18th words in your former cablegram and have applied the meaning to the half words. It has been our experience that the repetition of the entire 10 letter code word, as originally given, eliminates confusion that might be caused by splitting the words in the repetition and, therefore, for the future kindly take notice that whenever we request the repetition of a word from abroad, we have reference to the entire 10 letter word, i.e., to combined code words, and we count the number of words of a telegram exactly as the telegraph company does when charging for the expenses thereof, i.e., we refer here to the text only and not to the address.

573

We are in agreement with the prices named in your quotation and as we are also of concurring opinion that the introduction of your type of periscope should in the end benefit us, should the Government become impressed with its

advantages, you may proceed with your quotation to the Attaché. Accordingly we telegraphed you as per copy in-
574 closed, reading as follows:

YEUFY:	Agree to proposition
YREED:	Quotation
SEBUM:	Sebum
TJUMF:	Proceed

It is evident from your report as well as from an inquiry that we have received ourselves very recently on the subject of cameras as auxiliary equipment to submarine periscopes, that the special features of foreign periscopes are receiving consideration at present. This can only find explanation in
575 two ways, either the present staff is more receptive to improvements and changes in the standard, than the personnel was when our Washington representative and we tried to introduce these features, or else the present Attaché has some influence with the Bureau in bringing these points up for consideration. Whatever the causes for this sudden interest and apparent change of attitude, it can only work out to our benefit in the course of time.

A copy of this letter is being sent to our Frankfurt Office which will inform Mr. August Lomb of what has transpired in the meantime. For the sake of record and to keep our files complete, we should thank you to send us and Mr. August Lomb a copy of your regular quotation to the At-
576 taché, so that we are fully informed of what you intend to supply and have this matter on file for future reference. You will also oblige us to keep us and Mr. August Lomb informed as regards the outcome of your quotation and any other successive arrangement that you may make in this connection with our Government.

Yours very truly,

BAUSCH & LOMB OPTICAL CO.

EM:BC
Incs.

EXHIBIT V.

February 25, 1938

Mil. Dept. 612.

577

Carl Zeiss
Militar Abteilung
Jena, Germany

Zu Handen von Herrn Neuffer.

Subject: Periscopes for Electric Boat Company.
Reference: Your letter N XIII/60256/Br/Sch.
February 16, 1938.

Gentlemen:

578

In response to your letter in reference, you are free to quote on the Periscopes referred to direct to the Electric Boat Company, inasmuch as we may presume that these Periscopes are not intended for the use of our Government, considering that we have not received such an inquiry from our Navy Department.

Yours very truly,

BAUSCH & LOMB OPTICAL CO.
S. H. W.

WM:MK

579

Zeiss Bill of Particulars.

IN THE

DISTRICT COURT OF THE UNITED STATES
580 FOR THE SOUTHERN DISTRICT OF NEW YORK

C 107-169

UNITED STATES OF AMERICA,

Plaintiff,

—*v.*—

BAUSCH & LOMB OPTICAL COMPANY, *et al.*,

Defendants.

581

The United States of America, by Samuel S. Isseks, Special Assistant to the Attorney General of the United States, its attorney, voluntarily submits the following bill of particulars, on information and belief, in answer to the demands of the defendant Carl Zeiss, Inc., embodied in the motion for a bill of particulars, dated October 18, 1940, and served upon the Government October 22, 1940.

The numbering herein follows the numbering in the defendants' motion papers.

1. The conspiracy and combination entered into on or
582 about April 28, 1921, as alleged in paragraphs 2, 15, and 16 of the indictment, was on or about that date entered into by defendant Bausch & Lomb Optical Company (hereinafter referred to as Bausch & Lomb), its then vice president, George N. Saegmuller (now deceased), and Carl Zeiss of Jena, Germany (hereinafter referred to as Zeiss), and its officers, Dr. Ing. Bauersfeld and another named "Kotthaus."

The conspiracy and combination was in writing, and photostatic copies of a written agreement in German between Bausch & Lomb and Zeiss and an English translation of such agreement made for and by the defendant Bausch & Lomb, both produced by the defendant Bausch & Lomb before the Grand Jury in compliance with a subpoena duces tecum served upon it, are annexed hereto and marked, respectively, Exhibits A and B. 583

In addition to the express terms of the agreement as set forth in Exhibits A and B to this bill of particulars, it was agreed between defendants Bausch & Lomb and Zeiss, and the other individuals referred to who entered into the combination and conspiracy, that in the case of sales made by Bausch & Lomb or Zeiss for use in the territory exclusively assigned to the other, Bausch & Lomb and Zeiss would together fix, maintain, and control arbitrary, artificial, and unreasonable prices and terms of sale of military optical instruments; that Zeiss would not permit any person, firm, or corporation which was engaged or which wished to engage in the United States in the business of manufacturing and distributing military optical instruments in competition with Bausch & Lomb, to use any of the devices, information, instruments, machinery, or equipment of Zeiss on any terms in connection with such manufacture and distribution, even though such persons, firms, or corporations were ready, willing, and able to compensate Zeiss for the use of such knowledge, information, devices, instruments, machinery, and equipment; and similarly that Bausch & Lomb would not permit any person, firm, or corporation which was engaged or which wished to engage outside the United States in the business of manufacturing and distributing military optical instruments to use any of the devices, information, instruments, machinery, or equipment of Bausch & Lomb on any 584 585

terms in connection with such manufacture and distribution, even though such persons, firms, or corporations were ready,
586 willing, and able to compensate Bausch & Lomb for the use of such knowledge, information, devices, machinery, and equipment.

The details and circumstances with regard to the entering of this conspiracy and combination are as follows:

Prior to April 28, 1921, a representative of Zeiss conferred in Rochester with officers, directors, and employees of Bausch & Lomb, including Edward Bausch, then president of Bausch & Lomb and now chairman of its board of directors, Carl F. Lomb (now deceased), William A. E. Drescher
587 (now deceased), and George N. Saegmuller (now deceased). As a result of negotiations in Rochester, said George N. Saegmuller, vice president, was designated and given full power of attorney by the directors of Bausch & Lomb to go to Germany and negotiate an agreement with Zeiss relating to military optical instruments and the division of territory in respect thereof. Said George N. Saegmuller, with his son, Frederick B. Saegmuller, then an employee of Bausch & Lomb, went to Germany and there negotiated the terms of the agreement hereinabove referred to in this bill of particulars. Said agreement provided that a separate Military Department of Bausch & Lomb would be created under the guidance of Zeiss. One Oswald H. Wolferts then left the
588 employ of Zeiss (with the consent of Zeiss) to become employed in the newly-created Military Department of Bausch & Lomb. On October 3, 1921, a committee consisting of Edward Bausch, defendant M. Herbert Eisenhart, said Frederick B. Saegmuller, and Dr. O. Eppenstein, representing Zeiss, executed a memorandum in Rochester for the creation by Bausch & Lomb of a new Military Department with said Frederick B. Saegmuller at its head and said

Oswald H. Wolferts as his assistant. By the terms of this memorandum, the Military Department was to report to the Executive Committee of Bausch & Lomb through defendant M. Herbert Eisenhart, said Frederick B. Saegmuller, and Joseph F. Taylor of Bausch & Lomb.

2, 4, and 5. Military optical instruments sold by Bausch & Lomb to foreign governments and to firms, shipyards, and individuals located in States of the United States other than the State of New York, as alleged in paragraph 3 of the indictment, were sold to the following: (Such instances are presently known to the Government based on documents produced by Bausch & Lomb before a Grand Jury pursuant to a subpoena duces tecum. There may be other instances shown by other records of defendant Bausch & Lomb, and the Government reserves the right to prove such other instances from such other records.)

(a) *When and Where Sold*	(b) *Description of Instruments and Price*		(c) *Name of Vendee*
Items (i) to (x)—See B & L, B/P p. 116.			
(xi) On or about 10/22/29	Washington, D. C.	12 gun sight telescopes	$385. each	Brazilian Government

3. Zeiss carries on the business of selling and distributing cameras, binoculars, microscopes, and other scientific optical equipment in the City of New York through the instrumentality and agency of Carl Zeiss, Inc. The particulars as to the kind and type of merchandise dealt in, bought, sold, and exchanged by Carl Zeiss, Inc., for and on behalf of Zeiss, together with the dates, nature, and terms and conditions of all contracts and agreements made or consummated by Carl

Zeiss, Inc., for and on behalf of Zeiss, and the nature and subject matter and time of any negotiations carried on by
592 Carl Zeiss, Inc., in New York, or in the United States of America, on behalf of Zeiss, are all in the possession of the defendant Carl Zeiss, Inc.; and the Government reserves the right to prove such particulars from documents, records, and notes or copies of communications between Carl Zeiss, Inc., and Zeiss, presently in the possession of Carl Zeiss, Inc.

6. The names of the different military optical instruments, of which, as alleged in paragraph 9 of the indictment, Zeiss and its subsidiary Nedinsco have been among the largest
593 manufacturers and sellers, are set forth in paragraph 1 of the indictment.

7 and 8. Prior to 1921, Bausch & Lomb and Zeiss competed with each other in the United States, England, France, Italy, Spain, Czecho-Slovakia, Yugoslavia, Roumania, Turkey, Japan, the British Dominions, Mexico, Colombia, Venezuela, Brazil, Argentina, Ecuador, Chile, Bolivia, Uruguay, Paraguay, Panama, Costa Rica, Guatemala, Honduras, Australia, New Zealand, and the United States, British, French, and Italian possessions and dependencies throughout the world in the sale of cameras, binoculars, microscopes and other scientific optical instruments, and military instruments, as
594 defined in paragraph 1 of the indictment. Further particulars as to the names and types of the particular instruments are presently in the possession of defendant Bausch & Lomb and the Government reserves the right to prove such particulars from documents in the possession of Bausch & Lomb at the time of the trial of this case.

Zeiss Bill of Particulars.

9. The documents embodying the particulars demanded in paragraph 9 were presented to the Grand Jury in response to a subpoena duces tecum served upon Bausch & Lomb. Sometime after the entry of a plea of *nolo contendere* to the indictment by Bausch & Lomb, said documents were returned to it, and are thus no longer in the possession of the Government. The Government, however, reserves the right to prove the facts alleged in paragraph 11 of the indictment through documents presently in the possession of defendant Bausch & Lomb, and in the possession of the War and Navy Departments of the United States, together with the testimony of witnesses at the time of the trial of this case. 595

10. Military optical instruments sold by Bausch & Lomb direct to Governments other than that of the United States, as alleged in paragraph 12 of the indictment, are as follows: (Such instances are presently known to the Government based on documents of Bausch & Lomb produced before a Grand Jury pursuant to a subpoena duces tecum. There may be other instances shown by other records of Bausch & Lomb and the Government reserves the right to prove such other instances from such other records.) 596

Items (i) and (ii)—See B & L, B/P p. 117.

11. (a), (b), and (d). Military optical instruments purchased from Bausch & Lomb by various firms, shipyards and individuals located in the United States of America, as alleged in paragraph 13 of the indictment are those set forth under items (iii) to (xi) in paragraph 2 hereof, except that as stated in paragraph 2 hereof, there may be other instances not shown by records produced by Bausch & Lomb before the Grand Jury pursuant to a subpoena duces tecum, and the Government reserves the right to prove such other instances from other records of Bausch & Lomb. 597

(c) The instruments used in the construction of battle ships, cruisers and submarines intended for delivery to a
598 foreign country, as alleged in paragraph 13 of the indictment, formed parts of fire control apparatus of the battle ships "Rivadavia" and "Moreno", and were intended for delivery to the Republic of Argentina.

12. Military optical instruments imported into the United States through the Port of New York by Bausch & Lomb and Zeiss, as presently known to the Government, are set forth below. These instances have been disclosed by the records of Bausch & Lomb produced before the Grand Jury pursuant to a subpoena duces tecum. Many other instances may be shown by other records of Bausch & Lomb presently
599 in its possession, and the Government reserves the right to prove such other instances from such records:

Items (i) to (vii)—See B & L, B/P p. 119.

13. Carl Zeiss, Inc. entered into the conspiracy and combination, as alleged in paragraph 16 of the indictment, on or about December 11, 1925 by its knowledge, acceptance, and ratification of, and adherence to, the agreements then existing between Carl Zeiss, Jena and Bausch & Lomb, and subsequent to December 24, 1926, by its knowledge, acceptance, and ratification of, and adherence to, the agreements
600 then existing between Carl Zeiss, Jena and Bausch & Lomb, the dates and places where such knowledge, acceptance, confirmation and adherence were made and had being particularly known to Karl Bauer, present President of Zeiss, Inc. The Government reserves the right to prove such particulars at the time of the trial.

14. (a) A photostatic copy of the German agreement alleged in paragraph 17 (a) and (b) of the indictment, and

a photostatic copy of a translation of such agreement as made for and by Bausch & Lomb are attached hereto and marked Exhibits A and B, respectively. 601

(b) Such agreement was entered into on or about April 28, 1921 in Jena, Germany, and George N. Saegmuller (now deceased) acted on behalf of Bausch & Lomb.

15. (a) Copies of the agreements alleged in paragraph 17 (c) of the indictment, as translated in English by and for Bausch & Lomb, are annexed hereto and marked Exhibits C and D, respectively.

(b) The agreement of June 27, 1925 as alleged in paragraph 17 (c) of the indictment was executed on behalf of Bausch & Lomb at Rochester by Carl F. Lomb (now deceased). 602

The agreement of October 28, 1925, as alleged in paragraph 17 (c) was executed by Bausch & Lomb in Rochester on December 11, 1925 by said Carl F. Lomb.

16. (a) A photostatic copy of the German agreement alleged in paragraph 17 (d) and a translation of such agreement made for and by Bausch & Lomb are annexed hereto and marked Exhibits E and F, respectively.

(b) Such agreement was executed on behalf of Bausch & Lomb by Carl F. Lomb (now deceased).

603

17. Bausch & Lomb has refused to sell or to quote prices on military optical instruments for use outside the United States unless Zeiss consented to such sales, as alleged in paragraph 17 (e) of the indictment in the following instances: (Such instances are presently known to the Government based on documents of Bausch & Lomb produced before a grand jury pursuant to a subpoena duces tecum. There may be other instances based on other records of

Bausch & Lomb, and the Government reserves the right to prove such other instances.)

604 Items (i) to (v)—See B & L. B/P pp. 122-133.

Items (vi) to (xx)—See B & L. B/P pp. 122-133.

Items (xxi) to (xxxi)—See B & L. B/P pp. 122-133.

Items (xxxii) to (xliii)—See B & L. B/P pp. 122-133.

Items (xliv) to (liv)—See B & L. B/P pp. 122-133.

18 and 19. Bausch & Lomb since subsequent to May, 1921, has either sold or offered to sell military optical instruments for use outside of the United States, only after having first obtained the consent of Zeiss, as alleged in paragraph 17 (e)
605 of the indictment in the following instances: (The Government does not know whether in fact the offer of sale was consummated in each instance, but this is unquestionably known to the defendants. The instances set forth below are those presently known to the Government based on documents produced by Bausch & Lomb before a Grand Jury, pursuant to a subpoena duces tecum. The government reserves the right to prove other instances based on other records of Bausch & Lomb.)

Items (i) to (v)—See B & L. B/P pp. 134-135.

Items (vi) to (x)—See B & L. B/P pp. 135-136.

606 20. Bausch & Lomb has refused to permit the following persons, firms and corporations to engage in the production and distribution of military optical equipment outside of the United States or to use any of the devices, information, machinery or equipment of Bausch & Lomb for such production and distribution, as alleged in paragraph 17 (e) of the indictment: (Such instances are presently known to the Government and the Government reserves the right to prove

other instances if information regarding the same becomes available to the Government before the trial.)

607

Items (i), (ii) and (iii)—See B & L, B/P p. 137.

21. Zeiss has refused to sell military optical instruments for use within the United States unless Bausch & Lomb consented to such sale, as alleged in paragraph 17 (f) of the indictment, in the following instances: (Such instances are presently known to the Government based on documents produced by Bausch & Lomb before a Grand Jury pursuant to a subpoena duces tecum. Other instances may be disclosed by other records of Bausch & Lomb, or records of Zeiss or of the defendant Carl Zeiss, Inc., and the Government reserves the right to prove such other instances from such other records.)

608

Items (i), (ii) and (iii)—See B & L, B/P p. 138.

22. Zeiss has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb, as alleged in paragraph 17 (f) of the indictment. The instances set forth below are those presently known to the Government based on documents produced by Bausch & Lomb before a Grand Jury pursuant to a subpoena duces tecum. The Government reserves the right to prove other instances from other records of Bausch & Lomb, records of Zeiss, and records of the defendant Carl Zeiss, Inc.

609

Items (i) to (iv)—See B & L, B/L p. 139.

23 (a), (b), and (c). In July or August 1936, Zeiss refused to permit the Bendix Aviation Corporation to use any of its devices, knowledge, instruments and equipment for the production and distribution of military optical

instruments in the United States in competition with Bausch & Lomb.

610 (d) Bendix's representative in Europe, Francis Stanton, indicated his readiness, willingness and ability to compensate Zeiss for such use. The instance set forth above is the only instance presently known to the Government and is based on documents produced by Bausch & Lomb before a grand jury pursuant to a subpoena duces tecum. Other instances may be disclosed by other records of Bausch & Lomb, of Zeiss, and of the defendant Carl Zeiss, Inc., and the Government reserves the right to prove such instances from such other records.

611 24. The figures showing the amount of royalties paid by Bausch & Lomb to Zeiss of Jena since May 1, 1921, as alleged in paragraph 17 (g) of the indictment, and the names of the officers, agents, or representatives to whom, on behalf of Zeiss, Jena, each payment of said royalty was paid, are presently in the possession of Bausch & Lomb and the Government reserves the right to introduce such figures and names at the time of the trial.

25 and 30. Carl Zeiss, Inc., subsequent to on or about December 11, 1925, has refused to sell military optical instruments for use in the United States, as alleged in para-
612 graph 17 (h) of the indictment in the following instances: (Such instances are presently known to the Government through sources other than Carl Zeiss, Inc., although documents embodying this material were called for by a subpoena duces tecum served upon Carl Zeiss, Inc. There may be other instances based on other records of Carl Zeiss, Inc., which it has similarly failed to produce in response to a subpoena duces tecum, and the Government reserves the right to prove such other instances.)

	When	*Where*	*Instruments*	*Prospective Buyer*	*Substance of Refusal*
iv	In or about April 13, 1938	New York City	Panoramic Telescopic Gun Sights	National Forge & Ordnance Company	See Exhibit W and W[1] attached
ii	In or about March 1939	New York City	Collimator Tubes	American Armament Corp.	Oral refusal; name of Zeiss, Inc., representative known to Zeiss, Inc.
iii	In or about February 1940	New York City	Anti-Aircraft Height Finders	American Ordnance Corporation	Oral refusal; name of Zeiss, Inc., representative known to Zeiss, Inc.
iv	In or about July 1940	New York City	Anti-Aircraft Telescopic Sights	American Ordnance Corporation	Oral refusal; name of Zeiss, Inc., representative known to Zeiss, Inc.

Zeiss Bill of Particulars.

26. Bausch & Lomb refused to sell military optical instruments to prospective purchasers if such instruments were
616 eventually to go out of the United States of America as alleged in paragraph 19 (a) of the indictment in the following instances: (Such instances are presently known to the Government based on documents of Bausch & Lomb produced before a grand jury pursuant to a subpoena duces tecum. There may be other instances based on other records of Bausch & Lomb, and the Government reserves the right to prove such other instances.)

Items (i) to (iv)—See B & L, B/P p. 141.

617 27. Bausch & Lomb has refused to enter into arrangements whereby the information, knowledge, equipment, and machinery of Bausch & Lomb would be sold or employed in the manufacture of military optical instruments intended for use outside the United States as alleged in paragraph 19 (b) of the indictment in the following instance: (Such instance is presently known to the Government based on documents of Bausch & Lomb produced before a Grand Jury pursuant to a subpoena duces tecum. There may be other instances presently unknown to the Government and the Government reserves the right to prove such other instances.)

618 (a), (b), and (c). Bausch & Lomb refused to enter into such an arrangement with William E. Leigh, of New York City, acting on behalf of Standard Telephones and Cables, Ltd., of London. Refusal was in writing by letter dated July 1, 1938 addressed to Mr. Leigh in New York City and a copy of this letter is annexed hereto as Exhibit T. This refusal took place after negotiations were had by Mr. Leigh

first with representatives of Bausch & Lomb in New York City, and later with representatives of Bausch & Lomb, including the defendant Bausch, in Rochester. 619

28. Zeiss has shipped and Bausch & Lomb has received military optical instruments through the Port of New York as alleged in paragraph 19 (c) of the indictment in the following instance: (Such instance is presently known to the Government based on documents of Bausch & Lomb produced before a Grand Jury pursuant to a subpoena duces tecum. There may be other instances based on other records of Bausch & Lomb, the records of Zeiss, and the records of Carl Zeiss, Inc., and the Government reserves the right to prove such instances from such other records.) 620

For statistics—See B & L, B/P p. 143.

29. (a) and (b). Zeiss has collected and received from Bausch & Lomb royalty payments as alleged in paragraphs 19 (d) of the indictment. The royalty payments were made by check or draft drawn by Bausch & Lomb on its own bank payable to and deposited with The Chase National Bank of the City of New York, 18 Pine Street, New York City, for the account of Zeiss, in the years 1938 and 1939, and for the account of Nederlandsche Instrumenten Compagnie (Nedinsco), a wholly owned subsidiary of Zeiss, in the year 1937, on the dates set forth below as royalty for the calendar year stated: 621

For statistics—See B & L, B/P p. 144.

Zeiss Bill of Particulars.

Dated: New York, February 7, 1941.

Samuel S. Isseks

622 SAMUEL S. ISSEKS,
Special Assistant to the Attorney General
Attorney for the United States of America

Office and Post Office Address,
Room 233, United States Court House,
Foley Square,
Borough of Manhattan,
New York, New York.

To: C. LANSING HAYS, Esq.,
623 Attorney for Defendant Carl Zeiss, Inc.,

Office and Post Office Address,
1 Wall Street,
Borough of Manhattan,
New York, New York.

624

Exhibits Annexed to Bill of Particulars.

Exhibit A—See page 145.
Exhibit B—See page 145.
Exhibit C—See page 151. 625
Exhibit D—See page 153.
Exhibit E—See page 156.
Exhibit F—See page 157.
Exhibit G—See page 162.
Exhibit G-1—See page 164.
Exhibit H—See page 165.
Exhibit H-1—See page 167.
Exhibit I—See page 168.
Exhibit J—See page 169.
Exhibit K—See page 171.
Exhibit L—See page 173. 626
Exhibit M—See page 175.
Exhibit N—See page 179.
Exhibit O—See page 180.
Exhibit P—See page 181.
Exhibit Q—See page 182.
Exhibit R—See page 183.
Exhibit S—See page 186.
Exhibit T—See page 187.
Exhibit U—See page 188.
Exhibit V—See page 193.

The above exhibits are attached to the Carl Zeiss Inc. bill of particulars, and are the same as the exhibits attached to the Bausch & Lomb bill of particulars and have the same exhibit letters. 627

EXHIBIT W ANNEXED TO ZEISS BILL OF PARTICULARS.

April 11, 1938

628 Mr. Carl Leiss
485—5th Avenue
New York, New York

Dear Sir:

We are contemplating the purchase of fifty (50) Panoramic Telescope Guns Sights for use on our standard 75 M/M Guns. It has been called to our attention that you might be able to furnish us one of your standard sights that would be suitable for use on these guns. We would, therefore be pleased to have you forward us any literature
629 that you might have on sights that your company manufactures.

Very truly yours,

NATIONAL FORGE & ORDINANCE COMPANY
Chief Engineer, Ordnance Department

HHSwartzfager/ej

630

EXHIBIT W1 ANNEXED TO ZEISS BILL OF PARTICULARS.

(Letterhead of Carl Zeiss, Inc.) 631

In reply refer to M/H

April 13th, 1938.

National Forge & Ordnance Co.,
Irvine Warren Co., Pa.

Att. of Mr. Harry H. Swatrzfager,
Ordnance Dep't.

Gentlemen:

We thank you for your letter of April 11th requesting information on Panoramic Telescope Gun Sights for standard 75 mm guns. We are sorry to inform you that we do not import military instruments into the United States and would suggest that you get in touch with the Bausch & Lomb Optical Co. of Rochester, N. Y. 632

We regret our inability to be of better service to you in this instance.

We take pleasure in forwarding to you under separate cover a booklet about our Precision Finemeasuring Tools which may be of interest to you.

Yours very truly, 633

CARL ZEISS, INC.
S. HAYES

Complaint.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

634

CIVIL ACTION NO. 9-404

UNITED STATES OF AMERICA, PLAINTIFF

v.

BAUSCH & LOMB OPTICAL COMPANY, M. HERBERT EISENHART, CARL L. BAUSCH, THEODORE B. DRESCHER, AND CARL ZEISS, DEFENDANTS

635

COMPLAINT

The United States of America, seeking equitable relief by Samuel S. Isseks, Special Assistant to the Attorney General, acting under the direction of the Attorney General, complains and alleges, on information and belief, as follows:

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are
636 instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 as amended, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," said act being commonly known as the "Sherman Antitrust Act" against the above-named defendants in order to prevent violations by them jointly and severally as hereinafter alleged of Section 1 of the Sherman Act, and under Section 74 of the Act of August 27, 1894,

entitled "An Act to Reduce Taxation, to Provide Revenue for the Government, and for Other Purposes," as amended by the Act of February 12, 1913, entitled "An Act to Amend 637
Sections 73 and 76 of the Act of August 27, 1894," commonly known as the Wilson Tariff Act, against the above-named defendants in order to prevent violation by them jointly and severally as hereinafter alleged of Section 73 of the Wilson Tariff Act.

2. The alleged unlawful acts and violations hereinafter described, including the unlawful combination and conspiracy in restraint of interstate and foreign trade and commerce, have been and are carried out and made effective in part within the Southern District of New York, and 638
many of the unlawful acts done in pursuance thereof have been performed by the defendants or some of them and their respective representatives within said District. The interstate and foreign trade and commerce involved, as hereinafter described, are carried on in part within said District.

DEFINITIONS

3. The term "military optical instruments" as used herein shall be deemed to include such instruments as periscopes, range finders, altimeters, boresights, bomb sights, torpedo directors, sights for guns, and other scientific optical in- 639
struments (except binoculars) used to direct and control the firing of modern instruments of warfare. These instruments are an essential and integral part of what is commonly called the "fire control mechanism" of battleships, cruisers, and submarines. They are likewise essential to the rapid and accurate firing of modern instruments of warfare.

THE DEFENDANTS

640 4. The Bausch & Lomb Optical Company is hereby made a defendant herein. The said defendant, Bausch & Lomb Optical Company (hereinafter referred to as Bausch & Lomb) is a corporation organized under and existing by virtue of the laws of the State of New York, and has its principal place of business in Rochester, New York. For many years, Bausch & Lomb has maintained and now maintains an office in the Borough of Manhattan, City of New York, within this Southern District of New York, and has transacted business and now transacts business within the said District. Bausch & Lomb has been for many years, and is now, engaged in the business of manufacturing, 641 among other things, military optical instruments at its plant in Rochester, New York, and distributing and selling the said military optical instruments in interstate and foreign commerce.

5. Carl Zeiss is hereby made a defendant herein. The said defendant, Carl Zeiss (hereinafter referred to as Zeiss) is a corporation or association existing under and by virtue of the laws of Germany, and has its principal place of business at Jena, Germany. For many years Zeiss has been and is now engaged in the business of manufacturing, among other things, military optical instruments at its 642 plant in Jena, Germany, and distributing and selling these instruments in Germany and in other countries in the world. For a number of years Zeiss has carried on business in the Borough of Manhattan, City of New York, and within the Southern District of New York, through the instrumentality and agency of Carl Zeiss, Inc., a corporation organized on or about December 11, 1925, and existing by virtue of the

laws of the State of New York, which is a wholly owned subsidiary of Zeiss, and is completely dominated, controlled, and operated by Zeiss. Since 1921, Zeiss has carried on 643
business in Holland and in other countries through the instrumentality and agency of N. V. Nederlandsche Instrumenten Compagnie (hereinafter referred to as Nedinsco), a corporation organized under and existing by virtue of the laws of Holland, which has its principal office at The Hague, Holland, and which is a wholly owned subsidiary of Zeiss, and is completely dominated and controlled by Zeiss Through the instrumentality and agency of Nedinsco, Zeiss has carried on the business of manufacturing military optical instruments at a plant in Holland, and distributing and selling the said instruments in various countries in 644
the world.

6. The following individuals are hereby made defendants herein, each being associated with Bausch & Lomb, and each having the official title or position therewith shown below. Said individual defendants, during a part of the period of time covered by this complaint, and during all of the three years next preceding the date of the filing of this complaint, have held, and at the present time hold the official title or positions indicated below, and have been actively engaged in the management, direction, and control of the affairs and policies of Bausch & Lomb in connection 645
with the interstate and foreign trade and commerce described in this indictment.

Name of individual defendants	Address	Official Title or Position
M. Herbert Eisenhart	Rochester, New York	President.
Carl L. Bausch	Rochester, New York	Vice President in Charge of Research and Engineering.
Theodore B. Drescher	Rochester, New York	Vice President in Charge of Operations.

7. Whenever it is hereinafter alleged in this complaint that the defendant Bausch & Lomb did do or perform any
646 act or thing, the said allegation shall be deemed to mean that each of the said individuals named herein as defendants and described as officers, agents, or employees of Bausch & Lomb did authorize, order, direct, and do such act or thing. Whenever it is hereinafter alleged in this complaint that the defendant Zeiss did do or perform any act or thing, the said allegation shall be deemed to mean that the said act or thing was done by Zeiss, either in its own name or through the instrumentality and agency of Nedinsco or Carl Zeiss, Inc.

647 NATURE OF THE INTERSTATE AND FOREIGN COMMERCE INVOLVED

8. Since 1921 Bausch & Lomb has manufactured, distributed, and sold a substantial part of all optical instruments manufactured and distributed in the United States. In the five years next preceding the date of the filing of this complaint, Bausch & Lomb has manufactured, distributed, and sold approximately 50% of all military optical instruments manufactured, distributed, and sold within the United States.

9. For many years, including the three years next preceding the date of the filing of this complaint, Zeiss and its
648 subsidiary Nedinsco have been among the largest manufacturers and sellers of various types of optical instruments, including military optical instruments, in the world. For many years, including the three years next preceding the date of the filing of this complaint, Zeiss and Nedinsco have manufactured and sold the greater part of all military optical instruments manufactured and sold in Europe.

10. For many years prior to 1921 Bausch & Lomb and Zeiss competed with each other in countries other than the United States in the sale of all types of optical instruments, including military optical instruments. Since 1921 Bausch & Lomb and Zeiss have not competed either in the United States or in other countries in the world in the sale and distribution of military optical instruments, although they have continued to compete in the sale and distribution of certain other types of optical instruments. Bausch & Lomb and Zeiss for many years have manufactured and distributed and now manufacture and distribute and sell in the aggregate the greater part of all military optical instruments manufactured and sold in the world. 649 650

11. Bausch & Lomb manufactures military optical instruments at its plant in Rochester, New York, for sale and shipment in interstate commerce principally to the United States Government and has, upon occasion, as hereinafter alleged, also sold military optical instruments to foreign governments, and to firms, shipyards and individuals located in the states of the United States other than the State of New York. The United States Government purchases such instruments for use on battleships, cruisers, and submarines and for use with aircraft and artillery. Upon the receipt of an order from the United States Government, the said instruments are manufactured in Rochester, New York, and are shipped and transported in interstate commerce to the United States shipyards, forts, and various military and naval units located in San Francisco, California; Boston, Massachusetts; Brooklyn, New York; Philadelphia, Pennsylvania; Washington, District of Columbia; and to various other states of the United States of America. 651

12. On a number of occasions between 1921 and the date of the filing of this complaint, military optical instruments
652 have been sold by Bausch & Lomb directly to Governments other than that of the United States of America. Bausch & Lomb manufactured the said instruments in Rochester, New York, and shipped such instruments to the foreign country through the Port of New York, and such shipments constituted shipments in interstate and foreign commerce.

13. On a number of occasions between 1921 and the date of the filing of this complaint, military optical instruments have been purchased from Bausch & Lomb by various firms,
653 shipyards, and individuals located in the United States of America. The instruments were used in the construction of battleships, cruisers, and submarines intended for delivery to a foreign country. Bausch & Lomb manufactured the said instruments in Rochester, New York, and shipped such instruments to the various firms, shipyards, and individuals located in the United States of America, and such shipments constituted shipments in interstate commerce. Such instruments were intended for ultimate use in foreign commerce and were transported in foreign commerce.

14. At all times since 1921, including the three years next preceding the date of the filing of this complaint,
654 Bausch & Lomb and Zeiss have been engaged in importing military optical instruments into the United States through the Port of New York in the said Southern District of New York. Zeiss has shipped the said military optical instruments from points in Europe to Bausch & Lomb through the Port of New York in the said Southern District of New York. Except for the said military optical instruments

so shipped, neither Bausch & Lomb nor Zeiss has shipped to or imported into the United States any military optical instruments which have been manufactured outside the United States. 655

THE COMBINATION AND CONSPIRACY

15. Beginning on or about April 28, 1921, defendants Bausch & Lomb and Zeiss, and since the date they became officers or directors of defendant Bausch & Lomb, defendants Eisenhart, Bausch, and Drescher, and continuing at all times thereafter up to and including the date of the filing of this complaint, such defendants, and other persons well knowing all of the foregoing facts, have been engaged in a wrongful and unlawful combination and conspiracy, carried on in part within the Southern District of New York, in restraint of the aforesaid interstate and foreign commerce in military optical instruments in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," and in violation of Section 73 of the Act of Congress of August 27, 1894, entitled "An Act to Reduce Taxation, to Provide Revenue for the Government, and for other Purposes," as amended, that is to say: 656

16. The defendants, Bausch & Lomb and Zeiss, from on or about April 28, 1921, to the date of the filing of this complaint, and the defendants, Eisenhart, Bausch, and Drescher, since the time they became officers or directors of the defendant, Bausch & Lomb, to the date of the filing of this complaint, and other persons have been continuously engaged during and throughout the periods of time aforesaid in an unlawful combination and conspiracy to suppress and limit 657

competition between themselves by agreeing (a) to divide the world market for military optical instruments into cer-
658 tain geographical areas, the exclusive territory of Bausch & Lomb to be the United States of America, and the exclusive territory of Zeiss to be the rest of the world; (b) not to sell directly or indirectly such instruments for use in the area or territory allotted to the other without the prior consent of the other; (c) in the case of sales made by consent for use in the territory of the other, to fix, maintain, and control arbitrary, artificial, and unreasonable prices and terms of sale of such military optical instruments; (d) that Zeiss would not permit any person, firm, or corporation which was engaged, or which wished to engage in
659 the United States in the business of manufacturing and distributing military optical instruments in competition with Bausch & Lomb, to use any of the devices, information, instruments, machinery, or equipment of Zeiss on any terms in connection with such manufacture and distribution even though such persons, firms, or corporations were ready, willing, and able to compensate Zeiss for the use of such knowledge, information, devices, instruments, machinery, and equipment; and (e) that Bausch & Lomb would not permit any person, firm, or corporation which was engaged or which wished to engage outside the United States in the business of manufacturing and distributing military op-
660 tical instruments, to use any of the devices, information, instruments, machinery, or equipment of Bausch & Lomb on any terms in connection with such manufacture and distribution even though such persons, firms, or corporations were ready, willing, and able to compensate Bausch & Lomb for the use of such knowledge, information, devices, instruments, machinery, and equipment.

17. Said unlawful combination and conspiracy has been effectuated by divers means and methods, including among others, the following: 661

(a) On or about April 28, 1921, the corporate defendants entered into a written agreement in German for a period of twenty-one years, from May 1, 1921, to April 30, 1941. Paragraph 3 of such agreement, as translated by defendant Bausch & Lomb, provides as follows:

> B. & L. [Bausch & Lomb] obligate themselves not to sell, directly or indirectly, military instruments to countries outside of the United States of America, and vice versa Carl Zeiss obligate themselves not to sell such instruments directly or indirectly to the United States unless the parties have come to an agreement regarding the conditions of sale and the respective territories of distribution. 662

In paragraph 9 of the said contract Bausch & Lomb and Zeiss agreed to conceal the existence of the contract from third persons, and (so far as practicable) not to disclose the contract even to their own employees. Said agreement of April 28, 1921, is annexed hereto and made a part hereof as exhibit A, with the same effect as if it were fully and in detail set forth herein. 663

(b) In consideration of the obligations assumed by Zeiss in paragraph 3 of the said agreement of April 28, 1921, and certain other obligations assumed by Zeiss in the said agreement, Bausch & Lomb agreed in paragraph 2 of the said agreement of April 28, 1921, to pay to Zeiss for a period of twenty-five years from May 1, 1921, a royalty equal

to a percentage of the gross sales price of each military optical instrument sold by Bausch & Lomb, including each
664 piece of such equipment sold by Bausch & Lomb to the Government of the United States, the said royalty to be paid irrespective of whether the piece of military optical equipment so sold was covered in whole or in part by patents owned by Zeiss.

(c) The April 28, 1921, agreement alleged in paragraph 18 (a) of this complaint, was supplemented on June 27, 1925, and again on October 28, 1925, to modify the provisions of paragraph 2 with respect to royalty payments and to modify paragraph 3 so as to specify the circumstances
665 under which Bausch & Lomb and Zeiss could make quotations on military optical instruments, the eventual destination of which was the territory of the other, it being agreed that such a quotation could be made only with the consent of the other party to the agreement, and that the price quoted should be agreed by Zeiss and Bausch & Lomb. Bausch & Lomb and Zeiss agreed that if either were requested to make bids by any government on military optical instruments intended for use in the territory allotted the other, the requested quotation would contain a markup over the bidder's regular price up to 20% of said regular price, which excess was intended to throw the business to the
666 party to whom the territory was allotted and, in case such bid were successful, the excess was to be paid by the successful bidder to the other contracting party. The supplementary agreements of June 27, 1925, and October 28, 1925, are annexed hereto and made a part hereof as exhibits B and C, respectively, with the same effect as if they were fully and in detail set forth herein.

(d) A new agreement, signed by Bausch & Lomb at Rochester, New York, on November 26, 1926, and by Zeiss at Jena, Germany, on December 24, 1926, was entered into 667
by Bausch & Lomb and Zeiss. The said new agreement was identical with the agreement of April 28, 1921, as supplemented, except that paragraph 9 calling for secrecy was omitted from the new written agreement, paragraph 2 was modified as to the royalty payments, and paragraph 3 was changed so as not to indicate on its face that the parties to the contract had divided the world market between themselves and that each had agreed not to compete in the territory allotted to the other. Before the making of the said new agreement, Bausch & Lomb knew that paragraph 3 of the contract of April 28, 1921, as supplemented, vio- 668
lated the Antitrust laws of the United States, and the said new agreement was made to conceal the existence of the agreement to divide the world market and not to compete in interstate and foreign commerce. Notwithstanding this change in the form of the April 28, 1921, agreement as supplemented, Bausch & Lomb and Zeiss intended and continued to carry out the terms of paragraphs 3 and 9 of the April 28, 1921, agreement as supplemented in 1925. The said agreement of November 26-December 24, 1926, is annexed hereto and made a part hereof as exhibit D with the same effect as if it were fully and in detail set forth herein.

669

(e) At all times after May 1, 1921, to and including the three years next preceding the date of the filing of this complaint, Bausch & Lomb has refused to sell or to quote prices on military optical instruments for use outside of the United States, unless Zeiss has consented to such a sale. On a number of occasions since June 27, 1925, Bausch & Lomb has sold military optical instruments for use outside of the

United States only after first obtaining the consent of Zeiss as to the sale and the price and in the case of each such sale
670 the sale was made at an arbitrary, artificial, unreasonable, and non-competitive price agreed upon by Zeiss and Bausch & Lomb. On other occasions subsequent to May 1921, Bausch & Lomb has offered to sell military optical instruments for use outside of the United States, with the consent of Zeiss, at arbitrary, artificial, unreasonable, and non-competitive prices agreed upon by Zeiss and Bausch & Lomb. At all times subsequent to May 1921 to and including the three years next preceding the date of the filing of this complaint, Bausch & Lomb has refused to permit persons, firms, and corporations who were engaged or who
671 wished to engage in the production and distribution of military optical equipment outside of the United States, to use any of the devices, information, machinery, or equipment of Bausch & Lomb for such production and distribution, even though such persons, firms or corporations were ready, willing, and able to compensate Bausch & Lomb for such use.

(f) At all times subsequent to May 1, 1921, to and including the three years next preceding the date of the filing of this complaint, Zeiss has refused to sell military optical instruments for use within the United States unless the
672 sales were consented to by Bausch & Lomb. On various occasions subsequent to June 27, 1925, Zeiss has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb at arbitrary, artificial, unreasonable, and noncompetitive prices agreed upon by Bausch & Lomb and Zeiss. At all times subsequent to May 1, 1921, to and including the three years next preceding the date of the filing of this complaint, Zeiss has

refused to permit any person, firm or corporation engaged in, or who wished to engage in, the manufacture and distribution of military optical instruments in the United States in competition with Bausch & Lomb, to use any of the devices, knowledge, instruments, and equipment of Zeiss for the production of military optical instruments even though such persons, firms, and corporations were ready, willing, and able to compensate Zeiss for such use. 673

(g) Since May 1, 1921, to and including the three years next preceding the date of the filing of this complaint, Bausch & Lomb, pursuant to and in execution of the combination and conspiracy described in this indictment, has paid to Zeiss (pursuant to the provisions of paragraph 2 of the said agreement of April 28, 1921, as supplemented and modified, as described in paragraph 17 (a) (b), and (c) of this complaint), as a royalty, a percentage on the gross sales price of each piece of military optical equipment sold by Bausch & Lomb to the Government of the United States, and each such payment has been made irrespective of whether the piece of military optical equipment with respect to which the payment was made, has been covered in whole or in part by patents owned by Zeiss. 674

EFFECTS OF THE COMBINATION AND CONSPIRACY

18. By carrying out the combination and conspiracy hereinbefore described, the defendants have directly, substantially, and unreasonably restrained interstate and foreign commerce in military optical instruments; have exacted arbitrary, artificial, unreasonable, and noncompetitive prices from purchasers of military optical instruments, including the Government of the United States, and have 675

prevented and restrained free and vigorous competition in the production and distribution of military optical instruments in the United States and in interstate and foreign
676 commerce. The defendants intend to carry out the combination and conspiracy hereinbefore described and will continue to do so unless enjoined by this Court.

PRAYER

Wherefore, plaintiff prays:

(1) That writs of subpoena issue, directed to each defendant, commanding said defendant to appear herein and answer under oath the allegations contained in this com-
677 plaint and to abide by and perform such acts and decrees as the Court may make in the premises;

(2) That the Court adjudge and decree that the defendants have contracted, combined, and conspired to restrain trade in violation of Section 1 of the Sherman Antitrust Act and Section 73 of the Wilson Tariff Act.

(3) That the aforesaid conspiracy in restraint of trade be adjudged and decreed to be unlawful, and that all of the agreements, understandings, and practices alleged in this complaint be adjudged and decreed to be unlawful and in
678 violation of the Sherman Antitrust Act and the Wilson Tariff Act.

(4) That the agreements of April 28, 1921; June 27, 1925; October 28, 1925; and November 26-December 24, 1926, be adjudged and decreed to be unlawful and that the observance of each of these agreements in any respect and the execution of such agreements be perpetually enjoined.

(5) That the defendants and each of them and their officers, directors, agents, representatives, employees, and all persons and corporations acting and claiming to act on behalf of them be perpetually enjoined from agreeing, combining, or conspiring to restrain trade and from engaging in or participating in any practices, contracts, relationships, or understandings, or claiming any rights thereunder having a tendency to continue or revive any of the aforesaid violations of the Sherman Antitrust Act and the Wilson Tariff Act. 679

(6) That the plaintiff have such other further, general, and different relief as the nature of the case may require and the Court may deem proper. 680

SAMUEL S. ISSEKS,
Special Assistant to the Attorney General.

STANLEY E. DISNEY,
MONROE KARASIK,
IRVING B. GLICKFELD,
MARCUS A. HOLLABAUGH,
JOHN E. MCCRACKEN,
Special Attorneys,
Attorneys for the United States of America.

THURMAN ARNOLD, 681
Assistant Attorney General.

EXHIBIT A

Agreement of April 28, 1921

Paragraph 1

682 The firm of Carl Zeiss agrees to assist the firm of Bausch & Lomb in the sphere of Military instruments (Army and Navy) in the manner that:

a. It places at the disposition of the firm of Bausch & Lomb all of the drawings and other supporting data necessary for the manufacture in America;

b. It participates in the scientific and constructive improvement of existing instruments as well as in the development of new designs and problems with the same
683 amount of interest as it would bestow on its own tasks;

c. It places at the disposition of the firm of Bausch & Lomb, manufacturing rights for the United States of America for all existing inventions and industrial protected rights (note of translator: "patent rights") and those that out of the joint labor may still be created (in this connection new patents in the United States in the Military line shall not be acquired in the name of the firm of Carl Zeiss, but for its account in the name of the firm of Bausch & Lomb);

d. It assists in the engagement of the proper scientific
684 and technical personnel and if desired will temporarily send some of its higher officials to America (traveling expenses for account of Bausch & Lomb).

Paragraph 2

In return the firm of Bausch & Lomb agrees to pay to Carl Zeiss a royalty on its total gross earnings in the Mili-

tary line within and without the U. S. A. In this is comprised every shipment to Army and Navy authorities, as well as every sale of Military instruments to dealers and individual Military personages. 685

Exempt are field glasses, unless these form parts of other Military instruments or become Military instruments by the addition of special devices.

The royalty is calculated from the net invoice amount for the instruments furnished during the existence of this agreement. During the first seven years it amounts to 7%, in the consecutive seven years to 6%, and then it is reduced consecutively each year by ½% to ½% in the twenty-fifth year. The reduction below 6% does not take place in the case of instruments that are patented (paragraph 1c) 686 during the existence of the patent, unless, that the latter patent has reference to secondary parts only, in which case the parties shall come to an agreement as to a proper reduction.

PARAGRAPH 3

B. & L. obligate themselves not to sell, directly or indirectly, Military instruments to countries outside of the United States of America, and vice versa Carl Zeiss obligate themselves not to sell such instruments, directly or indirectly to the United States unless the parties have come to an agreement regarding the conditions of sale and the respective territories of distribution. 687

PARAGRAPH 4

In furtherance of the aims of this agreement B. & L. in Rochester will create a new Department solely responsible

to the Board of Directors, which is charged with the independent development of all scientific and technical tasks
688 within the Military scope and the maintenance of connections with Jena. The parties will come to an agreement as regards the heads to be placed in charge of this department.

PARAGRAPH 5

Workmen and employees of one party cannot even within one year after leaving the services, be employed by the other party, unless with the consent of the first party.

PARAGRAPH 6

689

Within the sphere of nonmilitary articles both parties are in free competition in the World's markets (inclusive of North America and Europe) during the existence of this contract. They shall, however, endeavor to give due consideration to one another relative to their common interests, as may develop from the close cooperation in the Military line and they make the reservation of coming to special agreements regarding respective territories and nonmilitary articles. In particular they will place new projects at the disposition of each other under royalty agreements.

690 PARAGRAPH 7

Both parties shall, in the Military line of instruments and in all other lines of endeavor, where they cooperate technically within the provisions of this agreement, exchange their manufacturing experience and give access to the workshops to confidential representatives of the other party. They shall take care, in this connection, that the advantages gained

from the cooperation shall not be shared by third parties, not concerned. Therefore, each party shall place at the disposition of the other, inventions in the Military line, acquired from a third party under the same favorable conditions under which it, itself, is making use of them. 691

If Bausch & Lomb should acquire patent rights not resulting from the Zeiss cooperation (paragraph 1c) but independent, therefrom, from employees of Bausch & Lomb, these patents also shall be at the disposition of Carl Zeiss or of such enterprises in which Carl Zeiss is interested with at least one-third of the capital stock, for the territory outside of the United States against the payment of a royalty of 4%, during the existence of the patent.

692

PARAGRAPH 8

The mutual obligation regarding the exchange of Military designs shall be void whenever the highest home Government of one party expressly demands that they be kept in confidence in the interest of the nation.

PARAGRAPH 9

The contracting parties agree to keep the foregoing agreement in strict confidence as regards a third party and to guard silence concerning this agreement also with their own employees as far as this may be practical under the circumstances. 693

PARAGRAPH 10

The parties recognize as concluded all previous agreements existing between them and that any claims on one another arising therefrom do not further exist. (Provision in letter of Apr. 28th.)

Exhibit A.

PARAGRAPH 11

This agreement enters into force with the first of May
694 1921 and continues until April 30, 1941, providing, however, for the continuance of the royalty payment according to paragraph 2.

PARAGRAPH 12

If, by reason of unforeseen political events, the execution of this contract shall be made impossible, temporarily or permanently, or the firm of Carl Zeiss limited in the enjoyment of its full license claims, this agreement shall be suspended for that time and upon an appeal the board of arbitrators shall make such dispositions as seem necessary
695 in order to carry out the will of the parties to this agreement under the changed conditions, as far as possible.

PARAGRAPH 13

In the case of differences of opinion, regarding the interpretation or execution of this agreement, between the parties, these differences are to be settled by arbitration. If the parties in such cases cannot agree on a common arbitrator, each party is to appoint its own arbitrator and these two arbitrators in turn will name a third as President. Only such persons are eligible to function as arbitrators who from the beginning of the dispute have not been
696 personally interested and are in no way employed by either party.

BAUSCH & LOMB OPTICAL CO.,

(signed) per GEO. N. SAEGMULLER, *Vice Pres.*
CARL ZEISS.

(signed) PPA DR. ING. BAUERSFELD.

(signed) KOTTHAUS.

Jena, April 28, 1921.

EXHIBIT B

Supplemental Agreement of June 27, 1925

In paragraph 2, the third paragraph receives the following wording: 697

> The premium will be calculated from the net invoice amount for the instruments furnished during the existence of this agreement. During the first ten years it amounts to 7%, in the consecutive seven years to 6%, and then consecutively it is reduced each year by ½% to 2% in the twenty-fifth year. The reduction in the rate of premium below 6% does not take place in the case of instruments that are patented (paragraph 1c) during the existence of the patent, unless that the letter patent has reference to secondary parts only, in which case the parties shall come to an agreement as to a proper reduction. 698

Paragraph 3 receives the following wording:

> The Firm of Bausch & Lomb obligates itself not to sell, directly or indirectly, Military instruments to countries outside of the United States of America, and vice versa Carl Zeiss obligates itself not to sell such instruments, directly or indirectly, to the United States, excepting under the following conditions:
>
> In the case of inquiries, received by Bausch & Lomb from authorities outside of the United States of America, by Carl Zeiss from the authorities of the United States, one party informs the other of the inquiry and is obligated to make the protective offer named by the other party. The increase of the protective offer over the normal price for the corresponding quantity 699

Exhibit B.

of instruments in question shall not be higher than 20%. Both parties are obligated to treat such inquiries
700 as promptly as possible. If the party, that has made the protective offer should, nevertheless, receive the order, it is obligated to cede in full to the other firm the excess price representing the protection. The Firm of Bausch & Lomb besides, has to pay to the firm of Zeiss the royalty on the normal price according to paragraph 2, in case Bausch & Lomb is awarded the order.

In the case of inquiries from American shipyards for delivery of optical instruments for the equipment of a ship of a country outside of the United States,
701 the firm of Bausch & Lomb will immediately communicate with Carl Zeiss. The business will then be done in common between both firms in the manner that Bausch & Lomb will furnish those instruments, which they have manufactured heretofore, and Nedinsco through the firm of Bausch & Lomb, the other optical instruments in question, which transaction shall exclude the payment of royalty by Bausch & Lomb to Carl Zeiss and include a commission of not less than net 5% for Bausch & Lomb. A protective offer the same as has been agreed in the above in the case of quotations to authorities does not apply in order not to give an-
702 other firm the chance of securing the order, in consequence of the high prices of Bausch & Lomb.

BAUSCH & LOMB OPTICAL CO.,
(Signed) CARL F. LOMB, *Vice Pres.*

Rochester.

CARL ZEISS,
(Signed) P. PA. KOTTHAUS.

Jena, June 27, 1925.

EXHIBIT C

Supplemental Agreement of October 28, 1925

In paragraph 2, the third paragraph receives the following wording: 703

> The premium will be calculated from the net invoice amount for the instruments furnished during the existence of this agreement. During the first ten years it amounts to 7%, in the consecutive seven years to 6% and then consecutively it is reduced each year by ½% to 2% in the twenty-fifth year. The reduction in the rate of premium below 6% does not take place in the case of instruments that are patented (paragraph 1c) during the existence of the patent, unless that the letter patent has reference to secondary parts only, in 704 which case the parties shall come to an agreement as to a proper reduction.

Paragraph 3 receives the following wording:

> The Firm of Bausch & Lomb obligates itself not to sell, directly or indirectly, Military instruments to countries outside of the United States of America, and vice versa Carl Zeiss obligates itself not to sell such instruments, directly or indirectly, to the United States, excepting under the following conditions:
>
> In the case of inquiries, received by Bausch & Lomb from authorities outside of the United States of America, by Carl Zeiss from the authorities of the United 705 States, one party informs the other of the inquiry and is obligated to make the protective offer named by the other party. The increase of the protective offer over the normal price for the corresponding quantity of instruments in question shall not be higher than 20%. Both parties are obligated to treat such inquiries as promptly as possible. If the party that has made the

protective offer should, nevertheless, receive the order, it is obligated to cede in full to the other firm the excess price representing the protection. The firm of
706 Bausch & Lomb besides, has to pay to the firm of Zeiss the royalty on the normal price according to paragraph 2, in case Bausch & Lomb is awarded the order.

In case the inquiries referred to in paragraph 2 and 3 should not come to Bausch & Lomb from a Government, but exceptionally from a commercial house of a country outside of the United States, the firm of Bausch & Lomb is to communicate immediately with the firm of Nedinsco, and, depending on the situation at Nedinsco, either to make the protective offer named
707 to her by the latter firm, or to decline the inquiry under pretense. The information in question will be given to the Firm of Bausch & Lomb by the firm of Nedinsco.

In the case of inquiries from American shipyards for delivery of optical instruments for the equipment of a ship of a country outside of the United States, the firm of Bausch & Lomb will immediately communicate with Carl Zeiss. The business will then be done in common between both firms in the manner that Bausch & Lomb will furnish those instruments, which they have manufactured heretofore, and Nedinsco through the firm of Bausch & Lomb, the other optical instruments in
708 question, which transaction shall exclude the payment of royalty by Bausch & Lomb to Carl Zeiss and include a commission of not less than net 5% for Bausch & Lomb. A protective offer the same as has been agreed in the above in the case of quotations to authorities does not apply in order not to give another firm the chance of securing the order, in consequence of the high prices of Bausch & Lomb.

Under the provision of paragraph 3, for the pro-

tective offer, only the normal price fixed by the firm of Carl Zeiss is subject to royalty payment, whereas the increase above the normal, to be turned over to the latter firm, is not subject to royalty. 709

In case that the firm of Bausch & Lomb cannot meet the normal price fixed by the firm of Carl Zeiss, but shall be forced in consequence of the higher cost of production to demand more, this increase, besides the normal price is subject to royalty, whereas the increase to be paid to the firm of Carl Zeiss on the normal price is not considered subject to royalty.

If a commission to an agent is to be paid, which as far as possible should be denied, but which nevertheless in certain cases cannot be avoided, this commission, calculated into the selling price is also subject to royalty payment. 710.

If the firm of Bausch & Lomb is furnishing to American shipyards, optical instruments as equipment for a ship of a country outside of the United States, all instruments in which the ideas of construction of the firm of Carl Zeiss have been used, shall, besides the trade name of Bausch & Lomb, be engraved with the designation, "System Nedinsco-Zeiss." Instruments according to the construction of Bausch & Lomb shall bear only their name. On instruments furnished by Nedinsco the name of Nedinsco will appear next to the name of Bausch & Lomb. 711

BAUSCH & LOMB OPTICAL CO.,
(Signed) CARL F. LOMB, *Vice Pres.*

ROCHESTER, *Dec. 11, 1925.*

PPA CARL ZEISS,
(Signed) FROSTMANN.

JENA, *October 28, 1925.*

EXHIBIT D.

Agreement of November 26—December 24, 1926

PARAGRAPH 1

712

The firm of Carl Zeiss agrees to assist the Bausch & Lomb Optical Company in the production and sale of Military instruments as follows:

(a) It will place at the disposal of the Bausch & Lomb Optical Company all of the drawings and other supporting data necessary for the manufacture in America.

(b) It will participate in the scientific and structural improvement of existing instruments as well as in the de-
713 velopment of new designs and the solution of new problems with the same amount of interest that it would bestow on its own work.

(c) It will place at the disposal of the Bausch & Lomb Optical Company, manufacturing rights (patent rights) in the United States of America for all existing inventions and protected processes as well as those inventions and processes that may in the future be created by the joint efforts of the firm of Carl Zeiss and the Bausch & Lomb Optical Company. New patents in the United States in the Military line will not be acquired in the name of Carl Zeiss but at
714 its expense in the name of the Bausch & Lomb Optical Company.

(d) It will assist the Bausch & Lomb Optical Company in the employment of proper scientific and technical personnel and, if desired, will send temporarily some of its high officials to America, traveling expenses to be paid by the Bausch & Lomb Optical Company.

Exhibit D.

PARAGRAPH 2

In return, the Bausch & Lomb Optical Company agrees to pay to the firm of Carl Zeiss a royalty on its total sales in the Military line within and outside the United States of America. In this total, all sales of Military instruments to the Army and Navy authorities, to dealers, and individuals are to be included. 715

Field glasses are exempt unless they form parts of other Military instruments or become Military instruments by the addition of special devices.

For the first ten years, this royalty, which will be calculated from the net invoice amounts of the instruments furnished during the existence of this agreement, will be 7%, for the next seven years 6%, and it will thereafter be reduced by ½% each year to 2% in the 25th year. There will be no reduction in the rate of royalty below 6% in the case of patented instruments during the existence of the patent unless the patent relates to parts of secondary importance only, in which case the parties shall come to an agreement as to the proper reduction (see Paragraph 1, article c). 716

PARAGRAPH 3

The license hereby granted is exclusive, the firm of Carl Zeiss agrees that it will grant no license to another American manufacturer. 717

PARAGRAPH 4

In furtherance of the aims of this agreement, the Bausch & Lomb Optical Company in Rochester will create a new Department responsible solely to the Board of Directors, which is charged with the independent development of all

scientific and technical tasks within the Military scope and the maintenance of associations with the firm of Carl Zeiss
718 in Jena. The parties will come to an agreement as regards the heads to be placed in charge of this department.

PARAGRAPH 5

Neither party will, without the consent of the other, employ persons who have left the service of the other within one year.

PARAGRAPH 6

In the production and sale of nonmilitary articles, both parties will remain in unrestricted competition in the
719 World's markets (including North America and Europe) during the existence of this contract. They shall, however, endeavor to give due consideration to one another's interests as those interests may be disclosed by the joint work in the Military line. Special agreements may be made regarding territories on nonmilitary articles. New projects may be placed at each other's disposal under royalty agreements.

PARAGRAPH 7

Both parties shall, in the Military line and in all other lines, where they cooperate technically within the provisions
720 of this agreement, exchange their manufacturing experience and give access to their respective manufactories to each other's confidential representatives. In this, however, they shall use every precaution that the advantages thus gained shall not be shared by disinterested third parties. Inventions in the Military line which may be acquired by either party from a third party shall be placed at the disposal of the other under the same conditions under which they

are acquired. If the Bausch & Lomb Optical Company should acquire patent rights not resulting from the Zeiss cooperation but independent therefrom, from its own em- 721
ployees, these patents shall also be placed at the disposal of Carl Zeiss or of such enterprises in which Carl Zeiss is interested to the extent of owning at least ⅓ of the capital stock, for the markets outside of the United States, Zeiss or its affiliated company to pay the Bausch & Lomb Optical Company a royalty of 4% during the life of the patent.

PARAGRAPH 8

The mutual obligation regarding the exchange of Mili- 722
tary designs shall be void whenever the highest home Government of one party expressly demands that they be kept in confidence in the interest of the nation.

PARAGRAPH 9

The parties recognize as concluded all previous agreements existing between them and that any claims on one another arising therefrom do not further exist. (Proviso in letter of Apr. 28th, 1921.)

PARAGRAPH 10

This agreement is effective as of May 1st, 1921, and con- 723
tinues in force until April 1st, 1941, with the reservation of the prolongation of the license (paragraph 2).

PARAGRAPH 11

If, by reason of unforeseen political events, the execution of this contract shall be made impossible, temporarily or

permanently, or the firm of Carl Zeiss limited in the enjoyment of its full license claims, this agreement shall be suspended for such time as is necessary and upon an appeal,
724 a board of arbitrators as subsequently designated, shall make such dispositions as may seem necessary to carry out as far as possible, the will of the parties to this agreement, under the changed conditions.

PARAGRAPH 12

In the case of differences of opinion, regarding the interpretation or execution of this agreement between the parties, these differences are to be settled by arbitration. If the parties in such cases cannot agree on a common arbitrator,
725 each party is to appoint its own arbitrator and these two arbitrators in turn will name a third as Chairman. The decision of the arbitrators on any question submitted to them shall be final and conclusive between the parties. Only such persons are eligible to function as arbitrators, who are not personally interested in the outcome of the dispute and not employed in any way by either party.

BAUSCH & LOMB OPTICAL COMPANY,
CARL F. LOMB, *Vice President.*

ROCHESTER, N. Y., *November 26, 1926.*

726

CARL ZEISS.

JENA, *December 24, 1926.*

Final Decree.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK 727

Civil Action No. 9-404

UNITED STATES OF AMERICA, PLAINTIFF

v.

BAUSCH & LOMB OPTICAL COMPANY, M. H. EISENHART, CARL L. BAUSCH, AND THEODORE B. DRESCHER, DEFENDANTS

FINAL DECREE 728

I. The United States of America filed its petition herein on July 8th, 1940; each of the defendants appeared and asserted their innocence of any violation of law; no testimony having been taken, each of the defendants consented to the entry of this decree without any findings of fact, upon condition that neither such consent nor this decree shall be evidence, admission or adjudication that they have violated any statute of the United States; and the United States of America, by its counsel, having consented to the entry of this decree and to each and every provision thereof, and having moved the Court for this injunction,

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Therefore, it is ORDERED, ADJUDGED, AND DECREED as follows:

II. That the Court has jurisdiction of all persons and parties hereto; and for the purposes of this decree and proceedings for the enforcement thereof, and for no other

purpose, that the Court has jurisdiction of the subject matter hereof and the petition states a cause of action against the defendants under the Act of July 2, 1890, entitled
730 "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," and under Section 73 of the Act of August 27, 1894, entitled "An Act to Reduce Taxation, to Provide Revenue for the Government, and for other purposes," as amended by the Act of February 12, 1913, entitled "An Act to Amend Sections 73 and 76 of the Act of August 27, 1894," commonly known as the Wilson Tariff Act.

III. Whenever the term "military optical instruments" is used hereinafter, it shall be understood to mean such
731 instruments as periscopes, range finders, altimeters, boresights, bomb-sights, torpedo directors, sights for guns, and other similar scientific optical instruments used to direct and control the firing of modern instruments of warfare.

IV. The individual defendants and the defendant Bausch & Lomb Optical Company, its successors, officers, directors, managers, employees, and agents, and each of them, be and they hereby are perpetually enjoined and restrained from agreeing, combining, or conspiring with any other manufacturer of military optical instruments:

732 1. To divide or allot among themselves the world market for military optical instruments, and to refrain from competing among themselves in the sale and distribution of such instruments in any portion of such market;

2. To refrain, whether with or without the prior consent of any other manufacturer, from selling, offer-

ing for sale or making price quotations on, military optical instruments for use in the area or territory allotted to such other manufacturer of such instruments; 733

3. To fix or maintain prices, quotations or terms of sale of military optical instruments;

4. To refuse to permit any person, firm or corporation engaged, or which wishes to engage, in the business of manufacturing and distributing military optical instruments, to use any of the devices, information, instruments, machinery or equipment of the defendant Bausch & Lomb Optical Company in connection with such manufacture and distribution if such persons, firms or corporations are ready, willing and able to compensate said Bausch & Lomb Optical Company adequately for the use of such devices, information, instruments, machinery or equipment; 734

5. To agree upon the prices which any other manufacturer of military optical instruments shall charge for such instruments;

6. To make bids or price quotations on military optical instruments at the request of any other manufacturer of such instruments; 735

7. To make offers for sale, price quotations or sales of military optical instruments conditional upon the consent of any other manufacturer of such instruments.

Nothing contained herein shall apply to the lawful conduct of the individual business of the defendant Bausch &

Lomb Optical Company, its affiliates or subsidiaries (including, without limiting the foregoing, its unrestricted
736 right to select its customers and to decline any business), or to the activities of the defendants other than in connection with military optical instruments.

V. The following agreements between defendant Bausch & Lomb Optical Company and the firm of Carl Zeiss of Jena, Germany (hereinafter referred to as "Carl Zeiss'), are hereby declared unlawful and the defendant Bausch & Lomb Optical Company is hereby enjoined from carrying out any of their provisions: Agreement dated April 28, 1921; Supplementary Agreement to the Agreement of April
737 28, 1921, dated June 27, 1925; Supplementary Agreement to the Agreement of April 28, 1921, dated October 28, 1925. The Agreement between Bausch & Lomb Optical Company and Carl Zeiss, dated at Rochester, November 26, 1926, and at Jena, December 24, 1926, is hereby declared unlawful, and the further execution and performance of the same having heretofore become impossible and the said agreement having heretofore been suspended, the defendant Bausch & Lomb Optical Company is enjoined from carrying out any of its provisions, including the payment of any royalties thereunder until the further order of this Court; provided, however, that nothing herein contained shall be construed to affect the rights of Bausch & Lomb Optical Company under
738 any patents for the manufacture of military optical instruments.

VI. For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General, or an Assistant Attorney

General, and on reasonable notice to the defendants as to time and subject matter, made to the principal office of the defendants, be permitted (1) reasonable access, during the office hours of the corporate defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the defendants, relating to any of the matters contained in this decree, (2) subject to the reasonable convenience of the defendants and without restraint or interference from them, and subject to any legally recognized privilege, to interview officers or employees of the corporate defendant, who may have counsel present, regarding any such matters; and the corporate defendant, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this decree; provided, however, that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States is a party, or as otherwise required by law.

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VII. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this decree, for the modification thereof (including, but without being limited to, any modification in order to conform this decree to any Act of Congress enacted or repealed after the entry of this decree), for the enforcement of compliance therewith, and for the punishment of violations thereof. Whenever obligations

741

are imposed upon the defendants by the laws or regulations of any State with which the defendants by law must comply in order to do business within such State, the Court,
742 upon application of the defendants or any of them, shall from time to time enter orders relieving the defendants from compliance with any requirement of this decree in conflict with such laws or regulations, and the right of the defendants to make such applications and to obtain such relief is expressly granted.

Any application by any party hereto under the provisions of this paragraph, shall be made in open court upon notice to all of the parties hereto, and any of the parties hereto, upon such application, shall have the right and privi-
743 lege of requiring the production of witnesses upon whose testimony such application is sought or opposed, and of examining and cross-examining such witnesses in accordance with the rules of the Court.

VIII. This decree shall go into effect immediately.

Dated, July 9, 1940.

WM. BONDY,
United States District Judge.

We hereby consent to the entry of the foregoing decree:

For the Plaintiff:

THURMAN ARNOLD,
744 *Assistant Attorney General.*

SAMUEL S. ISSEKS,
Special Assistant to
the Attorney General.

For the Defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher:

SIMPSON THACHER & BARTLETT.

Reply Affidavit of Whitney North Seymour.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

File No. Civ. 17-11 745

UNITED STATES OF AMERICA on the relation of MURRAY BRENSILBER and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, in their own behalf,
Plaintiffs,

—against—

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER, 746
Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

WHITNEY NORTH SEYMOUR, being duly sworn, deposes and says:

I am an attorney and counsellor at law and a member of the firm of Simpson Thacher & Bartlett, attorneys for defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher in this action. 747 This affidavit is submitted pursuant to leave granted in open court on January 16, 1942, in reply to the affidavit of Emanuel Thebner, verified January 15, 1942, and the affidavit of Murray Brensilber, verified January 15, 1942, which merely adopts and reiterates the said affidavit of Emanuel Thebner. Both affidavits were submitted in opposition to the motion of these defendants brought on by order

to show cause dated January 14, 1942, on the return day of this motion.

748 The said affidavit of Emanuel Thebner consists in large measure of legal arguments on the questions presented to this Court by this motion and from the records in the anti-trust proceedings brought by the Government and now on file in this Court and of erroneous conclusions thereon. My failure to deal with some of the egregious errors in said affidavit is not to be regarded as acquiescence therein. Nothing in that affidavit presents any valid reason why the relief sought by these defendants by the orders to show cause herein, dated January 6 and January 14, 1942, should not be granted; nothing in that affidavit satisfactorily

749 justifies the allegations made by these plaintiffs in their complaint herein, which are inconsistent with, or contradictory of, facts appearing in the pleadings in the anti-trust proceedings; nothing contradicts any of the categorical denials and statements of fact contained in the affidavits annexed to said orders to show cause and submitted in support of these motions. The opposing affidavits do not purport to be in opposition to the motions brought on by order to show cause dated January 6, 1942, and addressed to the complaint herein; they were not properly served as affidavits upon those motions, and they cannot be considered thereon. Examination of the records of the Government's anti-trust proceedings on file in this Court fully

750 demonstrates the falsity of the charges in the complaint heretofore more fully pointed out in the affidavit of M. Herbert Eisenhart; selected quotations of incomplete portions of such records and recourse to inapplicable rules of law do not obscure that fact.

The plaintiffs now admit that the charges expressly made in the complaint that the individual defendants are officers

of Carl Zeiss, Inc., as well as of Bausch & Lomb, was "an inadvertent error."

There is no satisfactory explanation of the admittedly false charge in the complaint that the agreements in question were *in fact* made between Bausch & Lomb and Carl Zeiss, Inc., one of such agreements being alleged to have been made even before the incorporation of the defendant Carl Zeiss, Inc. 751

Finally, the charge in paragraphs "Eighth" and "Ninth" of the complaint, to the effect that the agreements referred to required Bausch & Lomb to add 20% to all bids which it made to the United States Government on military optical instruments, is nowhere found in or supported by the records in the anti-trust proceedings referred to, and, indeed, is withdrawn in the purported amended complaint served by the plaintiffs herein. The reference in Mr. Thebner's affidavit to paragraph "Eleventh" of the purported amended complaint and the reliance on paragraph "17(b)" of the indictment in the anti-trust proceedings furnishes no support whatever for the false charge now sought to be withdrawn. 752

Since the complete records of the Government's anti-trust proceedings are contained in the files of this Court and have been brought before this Court not only by the moving defendants but also by the affidavit of Mr. Thebner, no further reference to or discussion of them is necessary here. Comparison of the statements contained in those records with those contained in plaintiffs' complaint herein demonstrates the falsity of the charges in the complaint in the particulars mentioned. 753

The affidavit of M. Herbert Eisenhart, submitted in support of this motion as well as in support of the motion brought on by order to show cause dated January 6, 1942, establishes not only that the material allegations of the

complaint are shown to be false by reference to the records in this Court but also that the charges are false in fact; that there was no requirement that Bausch & Lomb should
754 inflate its bids on military optical instruments to be supplied to the United States Government by 20% or any other amount, and that there was no such inflation of bids. The categorical denials of inflation of bids and of the submission of any excessive, false, fictitious or fraudulent claims of any kind to the United States Government by Bausch & Lomb or of fraud of any kind in transactions between Bausch & Lomb and the United States Government, reiterated and corroborated by the affidavits of the other individual defendants, are not even alluded to, much less
755 contradicted, in the affidavits of the plaintiffs. Comparison of the affidavit of Mr. Eisenhart shows no inconsistency with allegations in the anti-trust proceedings. Plaintiffs' assertion that issues of fact are raised on this motion is without substance.

The remaining statements in the affidavit of Mr. Thebner can be disposed of in an equally summary way. No extension of time to answer the complaint or the purported amended complaint was sought from plaintiffs by me or by anyone connected with my firm on behalf of these defendants; the only extension of time secured was that contained in the order to show cause dated January 6, 1942. The motion for summary judgment brought on by the said
756 order to show cause constituted a "responsive pleading" to the complaint herein and, upon the making of the motion, plaintiffs lost their right to amend their complaint as of course.

No question of the timeliness of defendants' motions is involved. The motion papers on the first motion, returnable January 16, 1942, were served upon the plaintiffs on January 6, 1942, ten days in advance of the time specified for

the hearing of the motion in accordance with the provisions of Rule 56(c), and, in any event, the provisions of the order to show cause dated January 6, 1942, pursuant to Rule 6, properly advanced the time for service of the motion papers to January 7th. The unsuccessful attempt of these plaintiffs to avoid hearing and decision on this motion by service of a purported amended complaint on January 13, 1942, made it necessary for these defendants to secure the order to show cause dated January 14, 1942, for relief with respect to the said purported amended complaint as set forth therein. Said order to show cause dated January 14, 1942, properly reduced the time for service of the motion papers upon the plaintiffs, pursuant to Rule 6, and no contention can be made that the said order to show cause and the papers upon which it was granted were not served in accordance with the said order. 757 758

The statement in the affidavit of Mr. Thebner that "plaintiffs are entitled under the Rules of Civil Procedure, Sections 26, 31 and 37, to apply for examination before trial, discovery and inspection and pre-trial relief even before answer" requires no answer. No such application has been made by these plaintiffs.

The stay in the order to show cause of January 14, 1942, was not prejudicial to them in any respect. It was made advisable by their attempt to circumvent defendants' motion returnable January 16, 1942. If plaintiffs desired to attack it, they were free to make application to do so. In any event, it cannot affect defendants' right to the relief sought by this motion. Plaintiffs' opposition on the return day and the filing of affidavits in opposition to this motion is sufficient answer to the contention that the stay was in any way prejudicial. 759

(Sworn to by Whitney North Seymour, January 21, 1942.)

Order Denying Leave to Amend, Etc.

At a Stated Term of the United States District Court, Southern District of New York, for the
760 hearing of motions, held in the United States Court House, in the Borough of Manhattan, City, County and State of New York, on the 24th day of January, 1942.

Present:

HON. ALFRED C. COXE,
United States District Judge.

[SAME TITLE]

761

Defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher having moved, by order to show cause, dated January 14, 1942, for an order herein

1. Striking as sham and false the complaint herein pursuant to the provisions of Rule 11 of the Federal Rules of Civil Procedure and directing the institution of appropriate disciplinary action against the plaintiffs herein for wilful violation of said Rule;

762 2. (a) determining that the proposed amended complaint of the plaintiffs herein served upon the attorneys for the defendants on January 13, 1942, is a nullity;

(b) denying leave to the plaintiffs herein to amend their complaint in accordance with said proposed amended complaint;

or in the event that said motion designated 2(a) and (b) be denied, and the complaint is amended in accordance with said proposed amended complaint,

763

3. (a) dismissing this action and the amended complaint herein as against the defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher on the ground that the venue of this action as to the said defendants has been improperly laid in the Southern District of New York;

(b) dismissing this action and the amended complaint herein as against the defendants on the ground that the amended complaint fails to state a claim upon which relief can be granted;

764

(c) granting summary judgment to these defendants on the ground that there is no genuine issue as to any material fact herein;

and the defendant Carl Zeiss, Inc. having moved, by order to show cause, dated January 14, 1942, for an order herein

Granting to the defendant, Carl Zeiss, Inc., the relief prayed for in the said notice of motion herein, dated January 6, 1942, and as an additional ground for relief in connection with said motion,

765

(a) Striking out as sham and false the proposed amended complaint and directing the institution of appropriate disciplinary proceedings of the plaintiffs herein for wilful violation of the Rules of Civil Procedure of this Court, and

(b) Directing the proposed amended complaint of the plaintiffs herein, of which a copy was delivered to the attorneys for the defendant, Carl Zeiss, Inc., on
766 January 13, 1942, is a nullity, and

(c) Denying leave to the plaintiffs herein to amend the complaint in accordance with the said proposed amended complaint, and

(d) In the event that the said motion be denied and that the plaintiffs' complaint be amended in accordance with the proposed amended complaint,

1. Dismissing the amended complaint herein under Rule 12 of the Rules of Civil Procedure on the ground
767 that the said amended complaint fails to state a cause of action against the defendant, Carl Zeiss, Inc., and

2. Granting summary judgment under Rule 56 of the Rules of Civil Procedure on the ground that the said amended complaint shows that there is no genuine issue as to any material fact therein and that the defendant, Carl Zeiss, Inc., is entitled to judgment as a matter of law,

and said motions having regularly come on to be heard on January 16, 1942,

768

Now, on reading and filing the summons and complaint and Marshal's returns herein, the order to show cause, dated January 6, 1942, and the annexed affidavits of Whitney North Seymour, M. H. Eisenhart, Carl L. Bausch, Theodore B. Drescher, E. Herman Anthes and Russell E. Craytor, all verified January 5, 1942, the notice of motion of Carl Zeiss, Inc., dated January 6, 1942, and the an-

nexed affidavit of Karl A. Bauer, verified January 6, 1942, the proposed amended complaint herein, the order to show cause herein, dated January 14, 1942, and the affidavit of 769
Whitney North Seymour, verified January 14, 1942, annexed thereto, the affidavit of Jack Kemp Busby, verified January 14, 1942, and the copy of notice of rejection of said proposed amended complaint, dated January 14, 1942, annexed thereto, the order to show cause herein, dated January 14, 1942, and the affidavit of Joshua D. Jones, verified January 14, 1942, annexed thereto and the reply affidavit of Whitney North Seymour, verified January 21, 1942, and the Indictment in this Court at the March 1940 Term, Index No. C107-169 entitled United States of America v. Bausch & Lomb Optical Company, et al., the complaint in 770
an action in this Court entitled United States of America v. Bausch & Lomb Optical Company, et al., Civil Action No. 9-404 and the exhibits annexed thereto, all in support of said motions, and the affidavits of Emanuel Thebner and Murray Brensilber, both verified January 15, 1942, as corrected by letter dated January 17, 1942, the complaint and proposed amended complaint herein, the Indictment in this Court at the March 1940 Term entitled United States of America v. Bausch & Lomb Optical Company, et al., Index No. C107-169, the two bills of particulars filed by the United States in said criminal action, the complaint in an action in this Court entitled United States of America v. Bausch & 771
Lomb Optical Company, et al. (Index No. Civ. 9-404), and the Consent Decree entered in said proceeding, all in opposition to defendants' motion, and after hearing Messrs Simpson Thacher & Bartlett (Whitney North Seymour, Esq., of counsel) for defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore R. Drescher, and Messrs. Gifford, Woody, Carter & Hays

(Joshua D. Jones, Esq., of counsel) for defendant Carl Zeiss, Inc., in support of said motions, and Emanuel Thebner, Esq. (I. Gainsburg, Esq., of counsel), in opposition
772 thereto, and due deliberation having been had thereon, and the Court not having passed upon the motions of the defendants requesting relief pursuant to Rule 11 of the Federal Rules of Civil Procedure, and on motion of Simpson Thacher & Bartlett, attorneys for defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher, and on motion of Messrs. Gifford, Woody, Carter & Hays, attorneys for defendant Carl Zeiss, Inc., it is

773 ORDERED that the proposed amended complaint of the plaintiffs herein is a nullity; and it is further

ORDERED that the plaintiffs herein be and they hereby are denied leave to amend their complaint in accordance with said proposed amended complaint on the ground that the said proposed amended complaint does not state a cause of action.

ALFRED C. COXE,
U. S. D. J.

774

Order and Judgment.

Civ. 17—11

At a Stated Term of the United States District Court, Southern District of New York, for the hearing of Motions, held in the United States Court House, Foley Square, in the Borough of Manhattan, City, County and State of New York, on the 24th day of January, 1942. 775

Present:

HON. ALFRED C. COXE,
United States District Judge.

776

[SAME TITLE]

Defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher having moved, by order to show cause dated January 6, 1942, to dismiss this action and the complaint herein on the ground that the venue of this action as to the said defendants has been improperly laid in the Southern District of New York, and on the ground that the complaint fails to state a claim against these defendants upon which relief can be granted; and for summary judgment on the ground 777 that there is no genuine issue as to any material fact herein, and that these defendants are entitled to judgment against the plaintiffs as a matter of law; and the defendant Carl Zeiss, Inc. having moved by notice of motion dated January 6, 1942, to dismiss this action and the complaint herein on the ground that the complaint fails to state a claim

against it upon which relief can be granted, and for summary judgment on the ground that there is no genuine
778 issue as to any material fact herein and that the said defendant is entitled to judgment against the plaintiffs as a matter of law, and said motions having regularly come on to be heard on January 16, 1942,

Now on reading and filing the summons and complaint and the Marshal's returns herein, the order to show cause dated January 6, 1942, and the annexed affidavits of Whitney North Seymour, M. Herbert Eisenhart, Carl L. Bausch, Theodore B. Drescher, E. Herman Anthes and Russell E. Craytor, all verified January 5, 1942, the notice of motion,
779 dated January 6, 1942, by Carl Zeiss, Inc. and the annexed affidavit of Karl A. Bauer, verified January 6, 1942, and the proposed amended complaint of the plaintiffs herein served on the defendants on January 13, 1942, and the reply affidavit of Whitney North Seymour, verified January 21, 1942, and the Indictment in this Court at the March 1940 Term, Index No. C107-169 entitled United States of American v. Bausch & Lomb Optical Company, et al., the complaint in an action in this Court entitled United States of America v. Bausch & Lomb Optical Company, et al., Civil Action No. 9-404 and the exhibits annexed thereto, all in support of said motions, and the affidavits of Emanuel Thebner and Murray Brensilber, both verified January 15, 1942, as
780 corrected by letter dated January 17, 1942, the complaint and proposed amended complaint herein, the Indictment in this Court at the March 1940 Term entitled United States of America v. Bausch & Lomb Optical Company, et al., Index No. C107-169, the two bills of particulars filed by the United States in said criminal action, the complaint in an action in this Court entitled United States of America

v. Bausch & Lomb Optical Company, et al. (Index No. Civ. 9-404), and the Consent Decree entered in said proceeding, all in opposition to defendants' motion, and after hearing 781
Messrs. Simpson Thacher & Bartlett (Whitney North Seymour, Esq., of counsel) for defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher and Messrs. Gifford, Woody, Carter & Hays (Joshua D. Jones, Esq., of counsel) for defendant Carl Zeiss, Inc., in support of said motions, and Emanuel Thebner (I. Gainsburg, Esq., of counsel) in opposition thereto, and due deliberation having been had thereon, and the Court not having passed upon the motion of the defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher to dismiss this 782
action and the complaint herein on the ground that the venue of this action as to said defendants has been improperly laid in the Southern District of New York, and on motion of Messrs. Simpson Thacher & Bartlett, attorneys for defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher, and on motion of Messrs. Gifford, Woody, Carter & Hays, attorneys for defendant Carl Zeiss, Inc., it is

ORDERED, ADJUDGED AND DECREED that the complaint herein be and it hereby is dismissed and that summary judgment be and it hereby is granted to all of the defendants as 783
aforesaid; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher recover of the plaintiffs herein $17.00 and the defendant Carl Zeiss, Inc. recover of the plaintiffs herein $15.00 as and for their costs

herein, as taxed by the Clerk, and that execution issue therefor.

784 Approved January 24th, 1942.

ALFRED C. COXE,
U. S. D. J.

Costs taxed and judgment rendered accordingly February 2, 1942.

GEORGE J. H. FOLLMER,
Clerk

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786

Notice of Appeal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

787

UNITED STATES OF AMERICA on the relation of MURRAY BRENSILBER and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, in their own behalf,

Plaintiffs,

—against—

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER,

788

Defendants.

SIRS:

PLEASE TAKE NOTICE, that the United States of America on the relation of Murray Brensilber and Emanuel Thebner, and Murray Brensilber and Emanuel Thebner, in their own behalf, plaintiffs, hereby appeal to the Circuit Court of Appeals, for the Second Circuit, from the judgment of the United States District Court for the Southern District of New York entered in the office of the Clerk thereof on the 2nd day of February, 1942, dismissing this action, and said 789
plaintiffs further appeal from the two orders of the said District Court of the United States, made in the above-entitled action, on the 24th day of January, 1942, by Hon. Alfred C. Coxe, District Judge, which said orders (1) grant summary judgment to the defendants and (2) deem the amended complaint a nullity and deny plaintiffs leave

to amend their complaint; and the said plaintiffs herein do hereby appeal from each and every part of the aforesaid judgment and orders, as well as from the whole thereof.

790

Dated: New York, N. Y., February 6, 1942.

Yours, etc.,

EMANUEL THEBNER,
Attorney for Plaintiffs,
Office & P. O. Address:
111 John Street,
Borough of Manhattan,
City of New York.

791 To:

SIMPSON THACHER & BARTLETT, ESQS.,
Attorneys for Defendants, Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher,
120 Broadway,
Borough of Manhattan,
City of New York.

GIFFORD, WOODY, CARTER & HAYES, ESQS.,
Attorneys for Defendant, Carl Zeiss, Inc.,
792 1 Wall Street,
Borough of Manhattan,
City of New York.

Stipulation as to Record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

793

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the District Court in this case, as agreed on by the parties.

New York, N. Y., May , 1942.

EMANUEL THEBNER,
Attorney for Plaintiffs-Appellants.

794

SIMPSON, THACHER & BARTLETT,
Attorneys for Defendants, Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher.

GIFFORD, WOODY, CARTER & HAYES,
Attorneys for Defendant, Carl Zeiss, Inc.

795

Clerk's Certificate.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

796

[SAME TITLE]

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, *ss.*:

I, GEORGE J. H. FOLLMER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is the transcript of the printed record of the said District Court in the
797 above-entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this day of May, in the year of our Lord one thousand nine hundred and forty-one and of the Independence of the said United States the one hundred and sixty-fifth.

GEORGE J. H. FOLLMER,
Clerk.

(Seal)

798

[fol. 267] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1942

No. 62

(Argued October 16, 1942. Decided November 5, 1942)

UNITED STATES ex rel. MURRAY BRENSILBER et al., Appellants,

v.

BAUSCH & LOMB OPTICAL COMPANY et al., Appellees

Appeal from a summary judgment of the District Court for the Southern District of New York, dismissing an action to recover penalties under § 231 of Title 31, U. S. Code.

Before L. Hand, Augustus N. Hand and Clark, Circuit Judges

Samuel Gottlieb for the appellants.

Whitney North Seymour for Bausch & Lomb Optical Company.

Joshua D. Jones for Carl Zeiss, Inc.

John T. Cahill, *amicus curiae.*

[fol. 268] PER CURIAM:

The statute (§ 231, Title 31, U. S. Code) applies only when the wrongdoer has "presented * * * any claim * * * knowing such claim to be false, fictitious, or fraudulent." Arguendo we shall assume with the plaintiffs that this language includes more than claims which are not justified under contracts between the claimants and the United States; that it is not limited to claims for goods that have not been delivered, or to claims for goods of a kind not specified, or to claims for services that have not been rendered, or to claims computed at prices other than those agreed upon. We assume, that is, that if the claimant has once procured a contract by fraud, any claims he may thereafter present are "fraudulent," whether or not they fall within its terms. That seems to have been the understanding of the Ninth Circuit in *Dimmick* v. *United States,* 116 Fed. Rep. 825, and of the Third Circuit in *United States ex rel. Marcus* v. *Hess,* 127 Fed. (2d) 233. Nevertheless, the statute certainly makes fraud of some sort the basis of the liability, and uses the word in its accepted sense of deceit,

as appears from the juxtaposition of the three adjectives, "false," "fictitious" and "fraudulent." Therefore, although by hypothesis it would be enough that a claimant secured his contract by deceit, deceit is a *sine qua non;* it will not serve that he secured it by any other kind of wrong. The distinction is well illustrated in *United States* v. *Hess, supra.* The bidders had there all agreed that the defendant, one of their number, should get the contract; he was to put in a bid in an amount agreed to by all, which the others were to top so that their bids would inevitably be rejected. To put in such bids was a deceit, for the bidders intended that the bids should not be accepted, although by the act of bidding they represented that they hoped to succeed. The defendant, being a party to this deceit, which was the means [fol. 269] by which he procured his contract, was himself guilty of fraud. In the case at bar the contracts between Bausch & Lomb and Carl Zeiss of Jena (strictly only the second one is relevant) unlawfully gave Bausch & Lomb an advantage without which, we will assume—though that is not certain—they would not have secured their contracts with the United States. That was a wrong, but it was not a "fraud" unless Bausch & Lomb represented at some stage of the negotiations that they had not secured an unlawful monopoly of the market. Plainly a bidder who bids for a contract makes no representation, express or implied, as to the reasons which have led him or enabled him to put in his bid. He does indeed represent that he can perform, but he does not represent that there is an open market, or that his bid is "normal" or "reasonable," or "competitive." If he has been guilty of unlawful conduct in eliminating competitors, he can be called to account as Bausch & Lomb have been, but not because by bidding he has said anything about competition.

This would be the necessary result were the statute of the usual kind and entitled to a broad interpretation; but it is not, for it is not only penal, but drastically penal. *United States* v. *Bittinger,* 24 Fed. Cas. No. 14,599, p. 1150; *United States* v. *Kansas Pacific Ry. Co.,* 26 Fed. Cas. No. 15,500, p. 680; *United States* v. *Russell,* 19 Fed. Rep. 591. For this reason it has been strictly construed. *United States* v. *Shapleigh,* 54 Fed. Rep. 126 (C. C. A. 8); *Olson* v. *Mellon,* 4 Fed. Supp. 947, aff'd 71 Fed. (2d) 1021 (C. C. A. 3); *United States ex rel. Ostrager* v. *New Orleans Chapter,* 127 Fed. (2d) 649, 651 (C. C. A. 5); *United States ex rel.*

Marcus v. *Hess, supra,* 127 Fed. (2d) at 235. Furthermore, so far as it perpetuates the odious and happily nearly obsolete *qui tam* action, it should be regarded with particular jealousy.

In the view we take, it is not necessary to decide whether the plaintiffs had the unconditional right under Rule 15 (a) [fol. 270] to serve the amended complaint. The judge did indeed deny leave to amend on the ground that the second complaint did not state a cause of action, as to which he was perhaps wrong, taking the pleading as it reads. But in result it made no difference, for the amended complaint like the original was subject to summary dismissal, and it was mere matter of form whether it was accepted and then dismissed, or refused at the outset. The motion for summary judgment dismissing both was right because it appears beyond question that the supposed liability arose from the offense for which Bausch & Lomb were indicted and to which they pleaded nolo contendere, and that this in turn rested upon the contracts. No testimony was necessary or indeed relevant to the issues so arising. To subject the defendants to a long harassment by examination and trial upon a certainly empty charge could serve no purpose except possibly to force them to buy their peace, an extortion against which § 232 would not protect them. The action is of precisely the sort which a motion for summary judgment was intended to nip in the bud.

Judgment affirmed.

[fol. 271] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of November one thousand nine hundred forty-two.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Charles E. Clark, Circuit Judges.

UNITED STATES ex rel. MURRAY BRENSILBER, et al., Plaintiffs-Appellants,

v.

BAUSCH & LOMB OPTICAL COMPANY, et al., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 272] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States ex rel. Murray Brensilber, et al., v. Bausch & Lomb Optical Company, et al. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 23, 1942. D. E. Roberts, Clerk.

[fol. 273] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 3, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.